DOCKET

No. 86-1088-CFX
Status: GRANTED

Title: City of Canton, Ohio, Petitioner
v.
Geraldine Harris, et al.

Docketed:
January 2, 1987

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Phillips,Carter G.

Counsel for respondent: Fitten,Steven M., Rudovsky,David

NOTE: 11/10 Ext. ot 1/4 by Scalia, J. (cited)

Entry	Date	Note	Proceedings and Orders
1	Nov 6 1986		Application for extension of time to file petition and order granting same until January 4, 1987 (Scalia, November 10, 1986).
2	Jan 2 1987	G	Petition for writ of certiorari filed.
3	Feb 4 1987		DISTRIBUTED. February 20, 1987
5	Feb 5 1987		Order extending time to file response to petition until March 16, 1987.
6	Mar 16 1987		Order further extending time to file response to petition until March 25, 1987.
8	Mar 25 1987		Order extending time to file response to petition until April 3, 1987.
9	Apr 3 1987		Brief of respondents Geraldine Harris, et al. in opposition filed.
10	Apr 8 1987		REDISTRIBUTED. April 24, 1987
11	Apr 8 1987		REDISTRIBUTED. April 24, 1987
12	Apr 10 1987	X	Reply brief of petitioner Canton, OH filed.
13	Mar 1 1988		REDISTRIBUTED. March 4, 1988
15	Mar 7 1988		Petition GRANTED.
			**********
17	Mar 31 1988		Order extending time to file brief of petitioner on the merits until May 5, 1988.
18	May 5 1988		Joint appendix filed.
19	May 5 1988		Brief of petitioner Canton, OH filed.
20	May 5 1988		Brief amici curiae of Internatl. City Management Assn., et al. filed.
22	May 5 1988	G	Motion of International City Management Association, et al. for leave to file a brief as amici curiae filed.
21	May 16 1988		Record filed.
		*	Certified copy of original record, 6 volumes, box, received.
24	May 18 1988		Order extending time to file brief of respondent on the merits until June 30, 1988.
25	May 23 1988		Motion of International City Management Association, et al. for leave to file a brief as amici curiae GRANTED.
27	Jun 28 1988		Brief of respondent filed.
26	Jun 30 1988		Brief amici curiae of ACLU, et al. filed.
28	Jul 20 1988	G	Application (A88-60) filed by Petitioner, for an extension of time within which to file a reply brief, submitted to The Chief Justice.
29	Jul 25 1988		Application (A88-60) granted by the Chief Justice

No. 86-1088-CFX

Entry	Date	Note	Proceedings and Orders
			extending the time to file until August 11, 1988.
30	Aug 11 1988	X	Reply brief of petitioner Canton, OH filed.
31	Aug 12 1988		CIRCULATED.
32	Aug 29 1988		Set for argument. Tuesday, November 8, 1988. (2nd case) (1 hr).
33	Nov 8 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-1088

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251

Counsel for Petitioners

* Counsel of Record

January 2, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether inadequate training can be found to be a "policy or custom" of a City within the meaning of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), without independent evidence that the City knew or should have known that the training was inadequate and therefore that violations of constitutional rights might forseeably result from any inadequate training.

2. Whether a City's grant of discretionary authority to a municipal employee, which is exercised by an employee in a way that deprives a person of a constitutional right, shifts the burden to the City to prove that the training of its employee was adequate.

3. Whether the City of Canton was properly held subject to liability under 42 U.S.C. § 1983, for the actions of the admitting officer of the City's jail who had discretionary authority to arrange for medical care for an arrestee but who did not receive specialized medical training to detect potential emotional illness.

LIST OF PARTIES

Other parties, in addition to those listed in the caption are:

Stanley A. Cmich
David Maser
James Schnabel
Matthew Norcia
Richard Kuehner
John Daianu
Raymond Samolia

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TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1986

No. ———

CITY OF CANTON, OHIO,
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BERNADETTE HARRIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The City of Canton, Ohio ("Canton"), hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App., *infra*, 1a-11a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying Petitioner's Motions for Judgment Notwithstanding the Verdict or for a New Trial, (App., *infra*, 12a-18a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 2, 1986, and a petition for rehearing was denied on August 22, 1986. On November 4, 1986, Justice Scalia extended the time for filing a petition to and including January 4, 1987 (a Sunday). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend XIV, § 1) provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

STATEMENT

1. Respondent Geraldine Harris was lawfully arrested on April 26, 1978, by officers of the Canton Police Department who transported her to the City's Police Station in a patrol wagon. App., *infra*, 2a. When she arrived at the station, Mrs. Harris was found sitting on the floor of the wagon. The shift commander, who was present when the patrol wagon arrived, asked Mrs. Harris if she was in need of medical assistance or medication. Instead of responding to the question, Mrs. Harris asked to see "Ronnie," who is her son. *Id.* at 2a.

During the course of routine booking procedures, Mrs. Harris, who was leaning against the wall, slumped to a seated position on the floor. Officers assisted Mrs. Harris to her feet and placed her in a chair, but twice she slumped back to the floor. The City presented evidence at trial that Mrs. Harris was fully conscious and aware of her actions while she was in custody. The shift commander also testified that he did not believe that Mrs. Harris' behavior was caused by any illness or injury. Instead, Mrs. Harris' actions appeared to him to be merely an emotional reaction to her arrest. He testified that such reactions are not at all uncommon among arrestees. App., *infra*, 2a.

During the course of the booking procedures, Mrs. Harris was again asked if she required any medical attention or medication, and she again responded by asking to see "Ronnie." Following booking, Mrs. Harris was placed in a holding cell for a short period of time until bail was arranged and she was released to her family. Mrs. Harris was in police custody at the city jail for a total of no more than 30 to 40 minutes. App., *infra*, 2a-3a.

2. Mrs. Harris, together with her husband and daughter, subsequently brought this lawsuit under 42 U.S.C. § 1983, against various individual police officers involved in her arrest and detention, city officials, including the mayor and police chief and the City of Canton. Respondents did not, however, name the shift commander as a defendant. Respondents alleged, *inter alia*, that the City had violated Mrs. Harris' due process rights by depriving her of medical treatment during the course of her post-arrest detention.[1]

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[1] Respondents' complaint included a number of constitutional claims that were rejected by the district court or the jury, including claims under the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments. The court granted the motions for directed verdict by defendants Mayor Stanley A. Cmich and Police Chief David

The case was tried to a jury, which rejected all of respondents' extant claims except the claim that *the City* unreasonably denied Mrs. Harris medical attention. On that claim, the jury awarded Mrs. Harris $200,000 against the City. The City's motions for remittitur, new trial or judgment notwithstanding the verdict were denied. App., *infra*, 4a.

The court of appeals unanimously reversed the judgment of the district court, but the majority voted to remand the case for a new trial. App., *infra*, 9a. The majority separately analyzed the two theories of municipal liability upon which the jury was instructed. The first instruction predicated the City's liability on the mere participation of "supervisory personnel" in the alleged constitutional violation. The court unanimously held that that instruction was erroneous. Because the instruction presented an alternative theory of liability, the jury's award was reversed on that ground. *Id.* at 9a.

The majority remanded the case to the district court for a new trial on the adequacy of the City's training of police officers. The court held that the City could be liable, based on the evidence presented at trial, on the ground that the City had "an established policy of allowing shift commanders unfettered discretion . . . to make the decision to refer a prisoner to the hospital . . . coupled with the fact that these commanders were given no training or guidelines for making this decision." App., *infra*, 6a.[2]

Maser. The jury found in favor of all the other remaining defendants, police officers Schnabel, Norcia, Kuehner, Daianu and Samolia, on all of the counts against them. Respondents did not cross-appeal from these adverse judgments.

[2] Although the "inadequate training" theory was argued in the respondents' brief filed in the court of appeals, the district court did not instruct the jury on this theory. Instead, the district court held that the evidence concerning "the denial of medical attention

In particular, the evidence at trial established that the shift commander or "jailer" is responsible for determining whether prisoners require immediate medical attention. The regulations of the Canton Police Department specifically provide:

> [The shift commander] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

App., *infra*, 4a. The evidence showed that shift commanders did not receive any specialized medical training beyond basic first aid. The City assumed that the shift commander would make the decision whether hospitalization of a prisoner is necessary based on common sense and experience.

The court of appeals reasoned that inadequate training of officers which can be linked causally to a constitutional deprivation is a sufficient basis for imposing liability on a municipality. As applied, the court held that the grant of discretion to the shift commander to evaluate Mrs. Harris' medical condition coupled with *the City's failure* to "show any evidence of adequate training" raised "a

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. . . does not raise a jury issue concerning police training deficiencies." Tr. 4-168.

The jury was instructed that the City could be held liable on a related, but distinct, theory of "inadequate supervision." Specifically, the jury was instructed that:

> the burden of proof is upon Geraldine Harris to prove, by a preponderance of the evidence, that for the City of Canton and its police department to be held liable under Section 1983 [the City] *failed to supervise* its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result.

Tr. at 4-388-389, App., *infra*, 8a (emphasis added).

valid jury issue of municipal liability . . . ." App., *infra*, 6a (emphasis added). Accordingly, the court remanded the case back for a second trial on that issue alone.

Judge Merritt dissented. App., *infra*, 10a-11a. First, he noted that the City's policy regarding medical treatment of arrestees was clearly not unconstitutional. Second, he argued there was no basis for finding that it was the "custom" of the City to apply its regulation so as to deprive arrestees of their constitutional rights. App., *infra*, 10a. In the absence of a showing of custom or policy, he rejected the conclusion that "a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury . . . ." App., *infra*, 10a. He pointed out that the majority's "inadequate training" theory, as applied to the City of Canton, would, in effect, "erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has held that a city can be liable under Section 1983 for a deprivation of an arrestee's constitutional rights by a municipal employee even though the city had a policy which was clearly intended to protect the arrestee's rights and there was no evidence that the policy was a sham. Furthermore, the court below has held that liability may be appropriate even though there was no evidence that the City had any reason to foresee that its discretionary policy of providing medical care might not protect the arrestee's right to medical treatment. Indeed, the court of appeals has shifted the burden to the City to prove the adequacy of training once a plaintiff proves that an employee violated the plaintiff's constitutional rights. Accordingly, the decision below conflicts with this Court's decisions in *Monell* v. *New York*

City Department of Social Services, 436 U.S. 658 (1978), and *City of Oklahoma City* v. *Tuttle*, 105 S. Ct. 2427 (1985), and expands the liability of cities under Section 1983 beyond anything Congress ever intended. Moreover, some of the issues presented in this case are also presented in *City of Springfield, Mass.* v. *Kibbe*, 777 F.2d 801 (1985), *cert. granted*, 106 S. Ct. 1374 (1986) (No. 85-1217), in which certiorari already has been granted. For these reasons, the Court, at a minimum, should hold this petition pending the final disposition of *Kibbe*, and alternatively, should grant the petition to decide the important issues that are presented in this case that may not be resolved in *Kibbe*.

1. In *Monell*, this Court held that municipalities are "persons" subject to liability under 42 U.S.C. § 1983. In so doing, however, the Court made it clear that only those violations of constitutional rights that occur pursuant to municipal custom or policy are attributable to the municipality. This requirement was intended to "distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292, 1298 (1986) (emphasis in original).

It is helpful, in considering the elements of municipal liability under Section 1983, to analogize to the familiar elements of tort liability.[3] Generally, liability in tort requires proof of: 1) an act; 2) state of mind (intent, negligence, or strict liability); 3) causation; and 4) injury. *Monell* teaches that municipal liability for constitutional injury will only be imposed on the basis of a municipality's own *acts*, *i.e.*, on the basis of municipal

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[3] "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). *See also Tuttle*, 105 S. Ct. at 2439 (Brennan, J., concurring).

"custom or policy." *Respondeat superior* is an inappropriate basis for liability under the Act.

The instant case raises unresolved issues regarding the intent and causation elements of a Section 1983 claim. With respect to intent, the issue raised is whether a claimant must present independent proof of a deliberate "course of action consciously chosen from among various alternatives" by the municipality.[4] In particular, in the context of claim based not on a municipal act but rather on a municipality's failure to act (*i.e.*, inadequate training), the question is what showing of deliberate decisionmaking on the part of municipal policymakers is required to support a finding that the City adopted a "custom or policy" of inadequate training.

With respect to causation, the issue presented is what proof must plaintiff present of an "affirmative link" between the municipal custom or policy and the constitutional injury suffered by plaintiff. Specifically, the issue is what, if any, proof is required that the municipal "custom or policy" at issue—rather than the acts of an individual employee—was the moving force behind a constitutional violation.

2. The decision of the court of appeals, exposing the City of Canton to substantial liability under Section 1983 for "inadequate training," constitutes a serious misapplication of the principles set forth in this Court's decisions in *Monell* and *Tuttle* for determining what constitutes a custom or policy sufficient to establish municipal liability. Under the Sixth Circuit's interpretation of the "custom or policy" requirement, municipal governments may be held liable any time a plaintiff can prove that he suffered a constitutional injury at the hands of a municipal employee and that additional training of that employee

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[4] *See Tuttle*, 105 S. Ct. at 2436.

could have prevented the injury.[5] Such a holding, in effect, imposes municipal liability on a theory of *respondeat superior* because a plaintiff will almost always be able to adduce evidence that *some* level of additional training or supervision might have prevented the injury in question. Allowing Section 1983 claims to proceed under such a theory is, for several reasons, fundamentally inconsistent with the prior holdings of this Court.

First, with respect to the "intent" element of the custom or policy requirement of *Monell*, "the word 'policy' implies a course of action consciously chosen from among various alternatives." As the plurality opinion in *Tuttle* further noted: "it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice —that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 105 S. Ct. at 2436. Here, no such proof of a deliberate policy of inadequate training was presented.[6]

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[5] The evidence below did not even meet this minimal showing. Although Mrs. Harris presented evidence that subsequent to her arrest she was diagnosed as suffering from "gross stress reaction, anxiety and depression," there was no evidence presented that her injuries proximately resulted from the City's actions in failing adequately to train or supervise the shift commander who made the decision not to seek immediate medical attention for Mrs. Harris. In fact, there was not even any evidence as to whether Mrs. Harris' injuries resulted from the 30-40 minute delay in receiving medical attention rather than from other factors, such as the arrest itself.

[6] Indeed the only proof of a deliberate policymaking decision relevant to the situation at issue was the evidence presented that the City had adopted a policy of taking prisoners to the hospital when medical attention was requested by the prisoner or when the shift commander determined that medical attention was necessary. *See* page 5, *supra*.

The liability in this case is predicated not on any direct and compelling proof concerning the City's policy of providing neces-

The present case starkly illustrates the difficulty of divining municipal policy from the nonfeasance of municipal decisionmakers. There was no evidence presented that City officials had any knowledge that the shift commander was incapable of making a decision whether immediate medical attention was required. There was no evidence that any other prisoner ever suffered any injury or inconvenience due to a denial of medical treatment. Nor was there any showing that the alleged "inadequacies" of the shift commander's decisionmaking had ever been brought to the attention of the relevant City policymakers. In such a situation, it is unreasonable to hold that the City deliberately—or even "recklessly"—adopted a "policy" of inadequate training. See *Tuttle*, 105 S. Ct. at 2436.

Second, the "inadequate training" theory as applied by the Sixth Circuit ignores the causation requirement of a Section 1983 cause of action. As this Court recently reaffirmed, Section 1983 requires that "the particular policy be the 'moving force' behind a *constitutional* violation. There must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation at issue." *Tuttle*, 105 S. Ct. at 2436-2437 n.8 (emphasis in original); *see id.*, at 2439 (Brennan, J., concurring) ("plaintiff must prove, in the broad causal language of the statute, that [this] policy or custom of the city 'subjected' him or 'caused him to be subjected' to the deprivation of constitutional rights"); *Rizzo* v. *Goode*, 423 U.S. 362, 370-371 (1976). It cannot be that a City is liable for actions of its employees which are

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sary medical care, but on the Sixth Circuit's finding that "the city could not show any evidence of adequate training." App., 6a. Not only does the court of appeals' holding erroneously reverse the applicable burden of proof, it ignores the only real evidence of municipal policy and premises liability on the jury's standardless and unreviewable discretion to determine whether the City's training of shift commanders was "adequate."

undertaken in spite of official policy instead of because of it. Compare *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979).[7]

Respondents in the instant case presented no evidence to support their theory that an unconstitutional denial of medical attention was *caused* by the City's "policy" of inadequate training. At best, respondents were able to prove two discrete facts: that Mrs. Harris did not receive medical attention while detained at the jail and that the City failed to adduce evidence that the officer who was responsible for and who made the decision had received specialized medical training. But there was no indication of what, if any, additional training could have, or would have, prevented the claimed deprivation of Mrs. Harris' rights. In short, respondents did not establish that the City's training "policy" caused Mrs. Harris' injuries in a " 'but for' sense," and they certainly did not establish that the alleged constitutional violations occurred "*pursuant to*" City policy. See *Pembaur*, 106 S. Ct. at 1299-1300 n.11 (emphasis in original).

This case thus presents an opportunity for the Court to clarify the requirement that there must be an "affirmative link" between City policy and the constitutional violation alleged. *Tuttle*, 105 S. Ct. at 2436. Particularly in cases such as this, where the custom or policy alleged is a city's failure to train (or failure to do any other act), it is important that the lower courts and litigants have clear guidance with respect to the requirement that the violation must be proven to have occurred "pursuant to" the City's custom or policy.

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[7] In *Pembaur* v. *City of Cincinnati*, the plurality opinion noted that both the majority and concurrence in *Tuttle* "found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant* to a municipal policy rather than simply resulting from such a policy in a 'but for' sense." 105 S. Ct. 1292, 1299-1300 n.11 (emphasis in original).

Finally, this case demonstrates the substantial impact on municipalities that an unduly generous application of the *Monell* standards permits. The court of appeals has sanctioned a theory of Section 1983 liability that is so broad that virtually any conduct of a municipal employee can be attributed to his governmental employer under an "inadequate training or supervision" theory. By so doing, the court of appeals has "*sub silentio*" imposed the novel requirement upon cities that their police forces must provide "paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail." App., *infra*, 10a (Merritt, J., dissenting). It cannot lightly be assumed that Congress would impose such an onerous burden upon municipalities. Review by this Court of the decision below is therefore imperative to protect cities and counties from having to divert scarce resources from essential services and apply them to training programs designed to prevent constitutional violations which are not properly the *responsibility* of local governments. See *Monell*, 436 U.S. at 690-691.

3. On March 10, 1986, this Court granted the petition of the City of Springfield, Massachusetts in *City of Springfield* v. *Kibbe*, No. 85-1217 ("*Kibbe*"). In *Kibbe*, the First Circuit affirmed a jury verdict against the City of Springfield under Section 1983 based on the theory that the constitutional injury in question was the result of inadequate police training. *Kibbe* involved the conduct of police officers during the course of a high speed chase and subsequent shooting of a fleeing felon. Although the facts underlying the alleged constitutional injury are greatly dissimilar, the jury in *Kibbe* was instructed under a theory that required it to impose liability on the City if the jury could infer that a municipal custom or policy of "grossly negligent training" caused the injury in question.

Like the present case, *Kibbe* presents issues regarding the fundamental elements of a Section 1983 claim against

a municipality. Specifically, *Kibbe* raises the issue of whether a viable theory of Section 1983 liability based on inadequate training requires proof of either a deliberate decision by municipal policymakers or widespread practices that would put the relevant policymakers on notice. *Kibbe* also presents the separate, but related, issue of whether such a claim requires independent proof that the training in question was so grossly negligent as to amount to deliberate indifference. The fundamental issue in that case is identical to the issue presented here, *viz.*, whether the allegedly inadequate training of police officers constitutes a viable theory of municipal liability under 42 U.S.C. § 1983.[8] Accordingly, the Court, at a minimum, should hold this petition pending its decision in *Kibbe*.

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[8] There are currently at least five petitions for certiorari pending before the Court that raise the same, or similar, issues of municipal liability under Section 1983 based on inadequate training or supervision. *City of Rensselaer, New York* v. *Fiacco*, No. 85-1813 (filed May 2, 1986); *Vippolis* v. *Village of Haverstraw*, No. 85-1048 (filed Dec. 16, 1985); *City of Shepherdsville* v. *Rymer*, No. 85-1192 (filed January 16, 1986); *City of Borger* v. *Granstaff*, No. 85-1585 (filed March 27, 1986); and *County of Wayne* v. *Marchese*, No. 85-359 (filed Aug. 29, 1985). The Sixth Circuit's decision in *Rymer* v. *Davis*, 754 F.2d 198 (6th Cir.), *vacated*, 105 S. Ct. 3518, *reinstated on remand*, 775 F.2d 756 (6th Cir. 1985), *petition for cert. filed sub nom. City of Shepherdsville* v. *Rymer*, No. 86-1192, was the primary authority relied upon by the majority opinion below. App., *infra* 5a.

Even if the Court were to uphold the "inadequate training" theory as a potential basis for municipal liability under Section 1983 in *Kibbe*, review should nevertheless be granted in the present case. Although the City believes the *Kibbe* case was wrongly decided by the First Circuit, the evidentiary basis for liability under the inadequate training theory in the present case is even less than that in *Kibbe*. Moreover, the present case squarely presents issues of municipal liability not raised in *Kibbe*, such as the issue of which party bears the burden of proof regarding the adequacy of the training at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the outcome of *City of Springfield, Mass.* v. *Kibbe*, No. 85-1217 and then disposed of as appropriate in light of the disposition of that case, or alternatively, the petition should be granted.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251

Counsel for Petitioners

* Counsel of Record

January 2, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3314

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Plaintiffs-Appellees,

v.

STANLEY CMICH, *et al.*,
Defendants,

CITY OF CANTON, OHIO,
Defendant-Appellant.

[Filed July 2, 1986]

On Appeal from the United States District Court
for the Northern District of Ohio

BEFORE: LIVELY, MERRITT and JONES, Circuit Judges.

PER CURIAM. The City of Canton appeals from a judgment on a jury verdict finding the City liable under 42 U.S.C. § 1983 for causing Geraldine Harris to be denied medical care while incarcerated.

Mrs. Harris, a fifty two-year-old black woman, was driving her teenage daughter to school when she was stopped by a Canton police officer for speeding. The police officer ultimately arrested her because, as he claimed, she became uncontrollably upset and uncooperative. Mrs. Harris was put into a patrol wagon by two officers who arrived to transport her to the police station. She testified that she was pushed and thrown about violently, and jabbed in her ribs. The officers said a minimal amount of force was used and that Mrs. Harris was lifted and placed in the vehicle because she could not or would not walk on her own.

When the vehicle's door was opened at the station, the shift commander, Captain Maxson, was present. He had been notified by the officers of a possible need for his presence. He testified that Mrs. Harris "was just lying there," which was unusual because "I don't know of anybody that rides in a wagon on the floor." Captain Maxson thought Mrs. Harris might need medical attention, and asked her if she needed a doctor or medication. She did not respond to the question, but asked incoherently about a person named "Ronnie." No medical care was ordered.

During booking, Mrs. Harris was standing against a wall when she suddenly slumped to the floor. Officers helped her into a chair, but Harris slumped to the floor again. She was put back in the chair, but again fell. Captain Maxson testified that Mrs. Harris was left on the floor for a short time, up to ten minutes, to avoid further falls. He explained that emotional behavior is common upon incarceration, and that he and officer John Daianu believed that Mrs. Harris was merely excited and would calm down if left alone and permitted to see her family, as most arrestees do. The City argued at trial that she chose to slump each time and was fully conscious and aware of her actions.

Captain Maxson testified that after a few minutes in Booking, Mrs. Harris was taken to a cell. She testified

that while she was incarcerated, she was twice taken from her cell for searches of her person. After bond procedures were completed, Mrs. Harris was released at about 9:00 a.m., having been at the city jail for about 30 to 40 minutes. A little more than an hour had elapsed since she was stopped while driving.

Mrs. Harris's family had her taken to Timken Mercy Hospital by ambulance from the jail. Mrs. Harris was hospitalized for one week. She was diagnosed as suffering from gross stress reaction, anxiety and depression, with symptoms including immobility and respiratory difficulty. Psychiatric therapy was necessary periodically for more than a year.

Mrs. Harris, together with her husband and daughter, brought a civil action against the police officers, city officials and the City of Canton under 28 U.S.C. §§ 1981, 1983, 1985-86, and the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments. She claimed the following constitutional violations: unlawful seizure, cruel and unusual punishment, deprivation of liberty and physical well-being without due process, failure to provide equal protection of the law due to race, and unlawful search. In addition to these federal constitutional violations, Mrs. Harris claimed false imprisonment, assault and battery under state law. The complaint also charged the police with assaulting and battering the teenage daughter who was a passenger in the car with her.

Damages were based on physical and emotional injuries, pain and suffering, treatment expenses, loss of services to Mr. Harris, exemplary damages, and legal costs and fees. Compensatory damages of one million dollars and exemplary damages of two million were sought. In addition, plaintiffs requested injunctive and declaratory relief in regard to the police policies and practices. The suit was dismissed due to untimely filing under the applicable Ohio statute of limitations, but on appeal the Harrises

prevailed and the case was remanded for further proceedings. *Harris v. City of Canton*, 725 F.2d 371 (6th Cir. 1984).

A jury trial was held. In addition to the testimony described above, there was evidence presented as to the policies of the Canton police department in regard to medical treatment for prisoners. Section 334.7 of the Canton Police Regulations provides as follows:

> He [the jailer] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

Former police Chief Wyatt testified to the department's usual practice for implementing section 334.7 He stated that shift commanders are authorized to make medical decisions under section 334.7 in their sole discretion based on personal observation. In the face of this grant of discretion, there was no evidence offered that the City provided any training or instructions to shift commanders, other than minimal first aid instruction, to prepare them for making such determinations.

At the close of the evidence, the court denied the defendants' motion for directed verdict. The jury rejected all the Harrises' claims except one: the jury found that Mrs. Harris was unreasonably denied medical attention while incarcerated at the city jail, and it awarded her $200,000 against the City of Canton. The court denied the city's motion for remittitur, new trial, or judgment n.o.v., and this appeal followed. The City raises numerous issues, including the insufficiency of plaintiffs' evidence to raise a jury question on her claim of deprivation of medical attention, and improper instructions to the jury on Harris's theories of municipal liability.

In regard to her claim of an unconstitutional deprivation of medical care, *see Estellee v. Gamble*, 429 U.S. 97, 104-05 (1976); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976), Mrs. Harris contended that given her obvious signs of anxiety, hyperventilation and loss of ambulatory function, the officers should have referred her for medical care. She said that Maxson never even took her pulse in order to determine whether she needed care. Furthermore, she testified that the officers laughed at her and ridiculed her. Harris based municipal liability for the deprivation of medical care on two theories: (1) inadequate training by the City of its police officers, which proximately caused the deprivation; and (2) the participation of supervisory personnel in the deprivation.

I. Inadequate Training

Where a municipality has wholly failed to train or has been grossly negligent in training its police force, it may be concluded that there was a municipal custom that allowed or condoned certain violations of constitutional rights by police. *E.g.*, *Rymer v. Davis*, 754 F.2d 198, 201 (6th Cir. 1985), *vacated*, 105 S.Ct. 3518 (1985), *reinstated on remand*, 775 F.2d 756 (6th Cir. 1985); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982). To succeed in a claim that a municipality is liable for failure to train its police force, the plaintiff must prove that the municipality acted recklessly, intentionally, or with gross negligence. *See Hays*, 668 F.2d at 872 (6th Cir. 1982) (holding that "simple negligence is insufficient" to support liability of municipalities for inadequate training and supervision of individual officers). In addition, the plaintiff must demonstrate that the municipality's inadequate training of its officers was causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result. *Rymer*, 754 F.2d at 201.

Harris's theory of grossly inadequate training was based on the fact that the police had an established policy of allowing shift commanders unfettered discretion under rule 334.7 to make the decision to refer a prisoner to the hospital based on their personal judgment and perceptions, coupled with the fact that these commanders were given no training or guidelines for making this decision. The former police chief testified to the discretion in decision-making, and the city could not show any evidence of adequate training. Mrs. Harris's evidence on these two facts thus raised a valid jury issue of municipal liability under *Rymer* and *Hays* for grossly negligent failure to train. The district court did not err in finding that there was sufficient evidence to submit that theory to the jury and in denying a directed verdict. We have reviewed the court's instructions on this theory of liability, and we find them adequate.

II. Participation of Supervisory Personnel

Harris's suit was alternatively based on her claim that, when a supervisory officer actually participates in the deprivation, the City is liable for his acts because he is a supervisor. That position is incorrect. Mrs. Harris relies on the case of *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982), in which this court stated as follows:

> The district judge specifically found that [the supervisory officer] was directly responsible for *and personally participated in the deprivation* of the Smiths' constitutional rights. He both subjected and caused the appellees to be subjected to the deprivation of their civil rights and is thus liable under section 1983.

Id. at 225. This passage provides for liability under section 1983 when the supervisory officer participated in the wrongdoing. In *Smith*, however, the officer was appealing a judgment finding him personally liable. Municipal liability was not at issue. *Id.* at 221.

It is clear that for the City to be liable, there must be a City policy or custom that causes the deprivation. *See, e.g., Hays*, 668 F.2d at 872-73. In *Hays*, both the municipality and the individual supervisors were sued. The court first discussed the personal liability of the supervisory officers at length, explaining that their liability cannot be based merely on the fact that they had the right and duty to supervise the officers who allegedly committed the violation of the Constitution. Their individual liability must be based on their own grossly negligent conduct. *Id.* In other words, the supervisory officers could not be found personally liable on the basis of the doctrine of respondeat superior. Immediately following this discussion of the liability of the supervisory officers, the court stated that the liability of the municipality must also be based on its own conduct, that is, on a municipal policy or custom rather than on the acts of its employees:

> The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo v. Goode*, 423 U.S. at 370-71, 96 S.Ct. at 603-04. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 96 L.Ed. 2d 611 (1978).

Hays, 668 F.2d at 872. While it is clear that a city "can act only through its principal officials," *id.* at 875, a supervisor does not automatically render the city liable under section 1983 merely by engaging in misconduct. If he is a policy-maker and his act may be construed as setting or implementing a policy, then the act of a supervisor may render the city liable under certain circumstances, *see Pembauer v. City of Cincinnati*, 106 S.Ct. 1292, 1300 (1986), but we have no allegations or proofs of such a theory before us.

We find that Harris's alternate theory of municipal liability was legally defective. It should not have gone to the jury, and thus the question of the sufficiency of the evidence on this theory of liability is irrelevant. The pertinent part of the jury instructions is as follows:

> Accordingly, the burden of proof is upon Geraldine Harris to prove, by a preponderance of the evidence, that for the City of Canton and its police department to be held liable under Section 1983, *its police department and/or its supervisory personnel either in some way participated in the actual misconduct, if any,* or failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. Under such conditions, and only under such conditions, the City of Canton may fairly be determined as acquiescing in and implicitly authorizing such violations.
>
> * * * *
>
> Thus, if you find from the preponderance of the evidence that the city, acting through its police department and its supervisory personnel, actually participated in the alleged misconduct, you may conclude that the city and its supervisory personnel acquiesced in that misconduct and your finding will be for Geraldine Harris. Otherwise, you shall find in favor of the City of Canton.
>
> * * * *
>
> You are further instructed that you may not return a verdict against the City of Canton if you believe, from a preponderance of the evidence, that Mrs. Harris was denied medical treatment by a Canton police officer merely because of the fact that said police officer was an employee of the City of Canton. In other words, if you believe that the Canton Police Department adequately supervised, trained and controlled the police officers, then you shall return a verdict for the City of Canton even though you may believe, from a preponderance of the evidence, that an individual police officer in the employment of the city knowingly denied medical treatment to Geraldine Harris.

Tr. at 4-388 -90 (emphasis added). The City argues that this instruction impermissibly allowed the jury to find the City liable for the misconduct of its employees under the doctrine of respondeat superior. *See Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

In the first sentence of the passage quoted above, the part of the sentence following the word "or" provides a correct basis for municipal liability under Mrs. Harris's first theory of liability, discussed above; however, the part preceding the "or" provides an alternate basis for municipal liability that is incorrect. This instruction allows a finding of municipal liability merely because its supervisory personnel did a bad act, with no need to find that the city was a bad actor through a city policy or custom. This was error. We cannot know on which basis of liability the jury found the City liable, and accordingly, we must reverse.

We recognize that the trial court gave a correct statement of *Monell* when it stated, in the final quoted paragraph, that the City was not liable merely for employing officers who acted wrongfully. We conclude, however, that the instructions, read as a whole, could have misled and confused the jury as to the applicable principles of law.

The City has raised several other issues. We have considered them, and find no other error. The judgment of the district court is REVERSED and this case is REMANDED for a new trial.

MERRITT, Circuit Judge, concurring in part and dissenting in part. I concur in Part II of Judge Jones' proposed opinion for the Court. On Part I respecting the claimed unconstitutionality of the City's policy of handling the medical needs of the prisoners, I do not find the policy contained in § 334.7 of the Canton Police Regulations to be unconstitutional, nor do I find a custom of unconstitutional application of the policy. I read Judge Jones' opinion for the Court to conclude that a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury on remand. I cannot think of any way that the City could more specifically regulate or direct the exercise of this authority without providing paramedical officers or medical specialists of some type at the jail.

The exercise of such authority respecting medical care must be delegated to jailors or other intake officials if it is to be effectively exercised at all by the City. We should not erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail. It seems to me that ordinary common sense review and handling of cases on an individual basis by intake officers should pass constitutional muster. Intake officers must meet the "deliberate indifferent standard" of *Estelle v. Gamble*, 429 U.S. 97 (1976), but I see no need to embed within this standard a subsidiary special training requirement. Nor do I believe that the case should be submitted to a jury under a general charge so that the jury is

allowed to create such a requirement *sub silentio* as a part of its general verdict.

A TRUE COPY

Attest:

JOHN P. HEHMAN,
Clerk

By /s/
Deputy Clerk

ISSUED AS MANDATE: September 5, 1986

COSTS: None

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-18-A
JUDGE SAM H. BELL

GERALDINE HARRIS, *et al.*,
Plaintiff

—v—

CITY OF CANTON, *et al.*,
Defendant

[Filed Mar. 14, 1986]

ORDER

The above-entitled civil rights action is currently before the court on a motion filed by the City of Canton for judgment notwithstanding the verdict and alternative motion for new trial. This motion is less than two pages long and contains no citation to either case law or to specific evidence presented at trial. For the reasons which follow the motion is hereby denied.

On August 28, 1984 a trial by jury was commenced for nine days involving numerous federal and state causes of action by Geraldine Harris, her husband Willie and daughter Bernadette against the City of Canton and several individual police officers and supervisory personnel of the City. On September 12, 1984, the jury returned a

verdict against the City of Canton on the claim of denial of medical treatment and awarded Mrs. Harris damages of two hundred thousand dollars. The jury factually found that the City of Canton had violated Mrs. Harris' constitutional rights by denying her necessary medical treatment while she was incarcerated at the City Jail. In addition, the jury found in favor of the defendants on all of the remaining claims.

The grounds stated by the City for granting a motion for judgment notwithstanding the verdict are as follows:

1. There can be no liability against the City of Canton on an employer/employee theory.

2. There was no evidence of a custom, policy, or practice on the part of the City of Canton that it denies medical treatment to prisoners of its jail.

3. The "medical treatment" part of the charge was erroneous and confused the jury.

4. On April 26, 1978, the City of Canton was not a person amendable to suit pursuant to Section 1983.

The first issue raised by the City is presumably the argument that their liability was based upon a respondeat superior basis. The law is clear that in a civil rights action brought under 42 U.S.C. § 1983 a municipality may not be held liable for the negligent acts of an employee. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In *Monell* the Supreme Court expressly rejected respondeat superior as a basis for municipal liability in Section 1983 actions. The Court stated as follows:

> By our decision in *Rizzi v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and

without failure to supervise is not enough to support § 1983 liability.

436 U.S. at 694 n.58, 98 S.Ct. at 2037, 56 L.Ed.2d at 637.

In this action, the court ruled at trial that the City of Canton may not be held liable on the basis of respondeat superior. Consistent with that ruling, the court has reviewed the instructions given to the jury and does not find that any such instruction was given. In fact the court specifically instructed the jury that the City of Canton was not responsible for oversights or simple negligence in the supervision of personnel under the mandates of section 1983. Thus, the court finds that this ground for judgment notwithstanding the verdict is not applicable to the present action and is without merit.

The second and third grounds raised by the City of Canton are related and shall be dealt with herein together. In the second ground it is asserted that the evidence presented at trial was not sufficient to create a jury issue that the City of Canton through a policy or practice denied medical treatment to Mrs. Harris. In the third ground it is asserted that the court erroneously construed and applied the law as it concerns the medical treatment to be afforded by a municipality.

When a trial court is ruling on a motion for directed verdict or a motion for judgment notwithstanding the verdict, the evidence must be viewed in a manner most favorable to the non-moving party. *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d 570, 579 (6th Cir. 1979); *Krotkoff v. Gloucher College*, 585 F.2d 675, 677 (4th Cir. 1978); *Hull v. Holiday Inns of America*, 478 F.2d 224 (6th Cir. 1973); *Smitty Baker Coal v. United Mine Workers*, 457 F.Supp. 1123, 1130 (D.C. Va. 1978), *aff'd.* 620 F.2d 416 (4th Cir. 1980), *cert. denied* 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980). The evidence viewed in this manner showed that Mrs. Harris, while incarcerated at the Canton Jail, became incoherent and

lost the ability to stand or control her body movements which ultimately resulted in her slumping to the floor. While Mrs. Harris was in this condition, a supervisor of the police department was, pursuant to police policy, contacted by the jailers and he was able to examine the plaintiff. At that time, the supervisor was unable to communicate with the plaintiff due to her condition or get her to answer simple questions or move her body. Thereafter, the supervisor, using his common sense and best judgment, determined that Mrs. Harris did not need medical treatment and she was left lying on the floor. The supervisor had no special training in recognizing when medical treatment was necessary. Shortly thereafter, family members of the plaintiff called an ambulance and Mrs. Harris was removed to the hospital where she was admitted for approximately one week. At trial the plaintiff's physicians testified that when Mrs. Harris arrived at the hospital she required medical assistance.

Before a municipality can be held responsible for violation of an individual's constitutional rights, it must be demonstrated that the constitutional violation was caused by a custom, policy or practice of the City. *Monell v. Department of Social Services, supra.* A "custom, policy or practice" of a municipality does not only include the "policy statement, ordinance, regulation or decision adopted and promulgated by the City's governing body" but also includes the deprivations of constitutional rights caused by a governmental custom. *Williams v. Butler*, 746 F.2d 431, 435 (8th Cir. 1984). A governmental custom does not require the formal approval of the City's officials or formal ratification by some official decision-making body. *Rymer v. Trooper H.A. Davis*, —— F.2d ——(6th Cir. February 11, 1985); *Williams v. Butler, supra.*

The Sixth Circuit has ruled that a municipality may be liable for the actions of its police force when there is a complete failure to train the police or when such train-

ing is so reckless or grossly negligent that future police misconduct is almost certain to result. *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982); *cert. denied*, 103 S.Ct. 75 (1983). The vesting of complete *carte blanche* authority within a supervisory person in the police department without any special training may be determined by the fact finder to be reckless or grossly negligent. A municipality may be found liable by a jury when it permits decisions concerning the medical treatment of prisoners to be rendered by supervisors exercising only their common sense. *Rymer v. Trooper Davis, supra.*

Applying these legal standards to this action, the court held that a jury issue was present and instructed the jury accordingly. The evidence construed in a manner most favorable to Mrs. Harris could be found by a jury to demonstrate that the City of Canton had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners. Further, the jury could find from the evidence that the vesting of such *carte blanche* authority with the police supervisor without adequate training to recognize when medical treatment is needed was grossly negligent or so reckless that future police misconduct was almost inevitable or substantially certain to result. Thus, the court finds that the second and third grounds for a judgment notwithstanding the verdict are not well founded.

The final argument raised by the City of Canton is that a municipality is not a person amenable to suit under Section 1983. Presumably this argument is based upon the holding in *Monroe v. Pape*, 365 U.S. 167 (1960), wherein the Supreme Court found that Congress did not intend to bring a municipality under the ambit of Section 1983. *Id.* at 187-192. However, since the ruling in *Monroe* the Supreme Court has expressly overruled that holding and has found that a municipality is a person within the meaning of the statute and may be sued for constitutional deprivations. *Monell v. Department of Social Services, supra* at 664-689. *Also see: Brandon v. Holt*, 469 U.S. ——, 105 S.Ct. ——, 83 L.Ed.2d 878 (1985); *Williams v. Valdosta*, 689 F.2d 964 (11th Cir. 1982); *Hays v. Jefferson County, supra, Powe v. Chicago*, 664 F.2d 639 (7th Cir. 1981); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied* 456 U.S. 950, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1981). Since the City of Canton has cited no case law nor has the court discovered any law that would demonstrate that the cases cited above are no longer the law, the final ground for judgment notwithstanding the verdict is dismissed.

In the alternate motion for new trial, the City of Canton raises two grounds. The first ground is that the evidence was insufficient to render a verdict against the City. The court has already discussed the evidence construed pursuant to *Coffy v. Multi-County Narcotics Bureau, supra* at 579, and finds that the evidence was sufficient to submit to the jury the issue of the City of Canton's liability. Further, the court finds that this evidence is sufficient to support the jury's verdict.

The final ground raised by the City of Canton is that a new trial is proper because the judgment is excessive. In this circuit, the standard to be applied if the fact finders award of damages is "so large as to shock the judicial conscience." *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir. 1980); *Also see Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976); *Kroger Co. v. Rawlings*, 251 F.2d 943, 945 (6th Cir. 1958). Although the court concedes that the amount of $200,000 is a large award for the injuries sustained by Mrs. Harris, the court does not find that the award rises to a level that shocks the judicial conscience. Thus, the court does not find that the verdict was excessive. In making this finding it should be noted that the City of Canton has failed to offer any evidence of bias,

passion or prejudice on the part of the fact finders. In addition, the City has not shown where the award is significantly larger than cases involving similar injuries. Hence, this court shall permit the jury's verdict to stand.

Accordingly, the City of Canton's motion for judgment notwithstanding the verdict and alternative motion for new trial are hereby denied.

IT IS SO ORDERED.

/s/
SAM H. BELL
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3314

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Plaintiffs-Appellees,

v.

STANLEY CMICH, *et al.*,
Defendants,

CITY OF CANTON,
Defendant-Appellant

[Filed Aug.22, 1986]

ORDER

BEFORE: LIVELY, Chief Judge; MERRITT and JONES, Circuit Judges

The city of Canton has petitioned the Court to rehear its decision of July 2, 1986, affirming in part the judgment of the district court.

The Court has considered the petition for rehearing offered in support thereof. A majority of the panel finds that the issue of adequate training was properly before

this court on appeal, and so the petition is found not to be well taken.

It is therefore, ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman,
Clerk

OPPOSITION

BRIEF

(2)

No. 86-1088

In The
Supreme Court of the United States
October Term, 1986

CITY OF CANTON, OHIO,

Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS, BERNADETTE HARRIS,

Respondents.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN M. FITTEN*
EMMANUELLA HARRIS GROVES
DEXTER W. CLARK

CLARK & KOVACIK
22650 Lorain Road
Fairview Park, Ohio 44126-2214
(216) 734-2100

Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether inadequate training can be found to be a "policy or custom" of a City within the meaning of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), without independent evidence that the City knew or should have known that the training was inadequate and therefore that violations of constitutional rights might foreseeably result from any inadequate training.

2. Whether a City's grant of discretionary authority to a municipal employee, which is exercised by an employee in a way that deprives a person of a constitutional right, shifts the burden to the City to prove that the training of its employee was adequate.

3. Whether the City of Canton was properly held subject to liability under 42 U.S.C. § 1983, for the actions of the admitting officer of the City's jail who had discretionary authority to arrange for medical care for an arrestee but who did not receive specialized medical training to detect potential emotional illness.

LIST OF PARTIES

Other parties, in addition to those listed in the caption are:

Stanley A. Cmich
David Maser
James Schnabel
Matthew Norcia
Richard Kuehner
John Daianu
Raymond Samolia

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TABLE OF AUTHORITIES

No. 86-1088

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Respondents.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondents hereby oppose the petition of the City of Canton, Ohio ("Canton"), for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App., *infra,* 1a-11a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying Petitioner's Motions for Judgment Notwithstanding the Verdict or for a New Trial, (App., *infra* 12a-18a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 2, 1986, and a petition for rehearing was denied on August 22, 1986. On November 4, 1986, Justice Scalia extended the time for fiilng a petition to and including January 4, 1987 (a Sunday). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend XIV, §1) provides, in pertinent part:

> [N]or shall any State deprive any person of ilfe, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunites secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

STATEMENT

1. Respondent Geraldine Harris, a fifty two-year-old black woman, was driving her teenage daughter to school when she was stopped and subsequently arrested by Canton policeman James Schnabel for speeding (35 m.p.h. in a 20 m.p.h. zone). During the course of her arrest, Mrs. Harris was pushed and thrown about violently, and jabbed in her ribs and transported to the city jail in a paddy wagon.

Upon arrival, Mrs. Harris was met by the shift commander, Captain Allen Maxon, who had been notified by the arresting police officer (Schnabel) and those involved in her transport to the city jail, Matthew Norcia and Raymond Samolia, of a need for supervisory action.

During the course of her incarceration Mrs. Harris displayed obvious symptoms of incoherency, immobility, respiratory difficulty and anxiety requiring immediate medical attention. She was unable to stand or sit in a chair. Captain Maxon and the jailer, John Daianu, amused themselves by placing Mrs. Harris in the chair

several times and allowed her to fall to the floor. At trial, Maxon testified Mrs. Harris "got just what she deserved." Mrs. Harris testified she was taken from her cell and completely searched twice during the time of incarceration which lasted between 30 to 40 minutes. The family arranged for Mrs. Harris' bail and upon her release had an ambulance take her to the hospital where she remained for one week. Attending physicians diagnosed Mrs. Harris as suffering from gross stress reaction, anxiety and depression, with symptoms including immobility and respiratory difficulty. Mrs. Harris continues to suffer from the psychological scars of her ordeal until this day.

2. Mrs. Harris, along with her husband Willie and daughter, initiated this action alleging constitutional violations under 42 U.S.C. §§ 1981, 1983, 1985-86, and the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments. *Inter alia*, Mrs. Harris contended she was subjected to an unconstitutional deprivation of medical care. The trial court granted motions for directed verdict by defendants Mayor Stanley Cmich and Police Chief David Maser. The jury upheld the claim against the City of Canton based upon the denial of medical care. The City's motions for remittitur, new trial or judgment n.o.v. were denied.

The court of appeals reversed the district court and remanded the case for a new trial. Further, the court of appeals held the City could be liable, based on the evidence presented at trial, on the basis of "an established policy of allowing shift commanders unfettered discretion . . . to make the decision to refer a prisoner to the hospital . . . coupled with the fact that these commanders were given no training or guidelines for making this decision." App., *infra*, 6a.

REASONS FOR DENYING PETITION

1. A municipality can be deemed liable under § 1983 where it fails to train or is grossly negligent in training its police force so that constitutional violations are likely to result. *Hays v. Jefferson County*, 668 F.2d 869, at 872 (6th Cir. 1982); *cert. denied*, 103 S.Ct. 75 (1983). Also liability can be established by demonstrating constitutional violations were occasioned through the execution of a custom, policy, regulation, or decision either formally adopted or tacitly condoned by the municipality. *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427 at 2436-2439 (1985).

Here, the cause of the denial of medical treatment to Mrs. Harris is the shift captain acting pursuant to Canton Police Regulation 334.7, which reads as follows:

> He [the jailer] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

Capt. Maxon, as the shift commander and supervisor, possessed unfettered discretion to grant or deny medical treatment. The grant of discretion to the shift commander to evaluate Mrs. Harris' medical condition coupled with *the City's failure* to show any evidence of adequate training, constitutes gross negligence which would be likely to result in constitutional deprivations. *Rymer v. Davis*, 754 F.2d 198, 201 (6th Cir. 1985), *vacated*, 105 S.Ct. 3518 (1985), *reinstated on remand*, 775 F.2d 756 (6th Cir. 1985).

Harris is distinguishable from *City of Springfield, Mass. v. Kibbe*[1] in that *Kibbe* involves unconstitutional conduct *arising out of grossly negligent training* as opposed to a *regulation coupled with inadequate training* which foreseeably would result in a constitutional violation. The intent of the drafters of the regulation is irrelevant to the degree of training resulting in unconstitutional action taken by Capt. Maxon. That Maxon possessed *unfettered discretion* by departmental regulations, with *no formal training* to determine the need for medical treatment, is the valid issue which imposes § 1983 liability.

2. As previously discussed, the City could not show any evidence of training; the regulation granting Maxon as shift commander unfettered discretion to deny medical treatment constitutes the *affirmative link* with the constitutional violation described. *Tuttle*, 105 S.Ct. at 2436. The welfare and safety of the general public requires procedural safeguards which make available the most basic examination of physical suffering independent of ridicule, "gut reaction" and the unrestrained, lone supervisor acting without training or guidelines.

3. In summation, the issue of whether a police regulation coupled with grossly inadequate training or supervision constitutes a viable theory of municipal liability under § 1983 has already been subjected to sufficient appellate review. *Hays, supra*, 668 F.2d at 872-73. Unlike *Kibbe*, Harris unquestionably establishes that no training and an *unconstitutional* and *vague* regulation governing the availability of medical care to detainees, determines

[1]777 F.2d 801 (1985), *cert. granted*, 106 S.Ct. 1374 (1986) (No. 85-1217).

the issue of liability. This is distinguishable from the question of the *degree* of training on a sliding scale which may or may not infer the necessary ingredient of negligence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN M. FITTER*
EMMANUELLA HARRIS GROVES
DEXTER W. CLARK
CLARK & KOVACIK
22650 Lorain Road
Fairview Park, Ohio 44126-2214
(216) 734-2100
Counsel for Respondents

*Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3314

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Plaintiffs-Appellees,

v.

STANLEY CMICH, *et al.*,
Defendants,

CITY OF CANTON, OHIO,
Defendant-Appellant.

[Filed July 2, 1986]

On Appeal from the United States District Court
for the Northern District of Ohio

BEFORE: LIVELY, MERRITT and JONES, Circuit Judges.

PER CURIAM. The City of Canton appeals from a judgment on a jury verdict finding the City liable under 42 U.S.C. § 1983 for causing Geraldine Harris to be denied medical care while incarcerated.

Mrs. Harris, a fifty two-year-old black woman, was driving her teenage daughter to school when she was stopped by a Canton police officer for speeding. The police officer ultimately arrested her because, as he claimed, she

became uncontrollably upset and uncooperative. Mrs. Harris was put into a patrol wagon by two officers who arrived to transport her to the police station. She testified that she was pushed and thrown about violently, and jabbed in her ribs. The officers said a minimal amount of force was used and that Mrs. Harris was lifted and placed in the vehicle because she could not or would not walk on her own.

When the vehicle's door was opened at the station, the shift commander, Captain Maxson, was present. He had been notified by the officers of a possible need for his presence. He testified that Mrs. Harris "was just lying there," which was unusual because "I don't know of anybody that rides in a wagon on the floor." Captain Maxson thought Mrs. Harris might need medical attention, and asked her if she needed a doctor or medication. She did not respond to the question, but asked incoherently about a person named "Ronnie." No medical care was ordered.

During booking, Mrs. Harris was standing against a wall when she suddenly slumped to the floor. Officers helped her into a chair, but Harris slumped to the floor again. She was put back in the chair, but again fell. Captain Maxson testified that Mrs. Harris was left on the floor for a short time, up to ten minutes, to avoid further falls. He explained that emotional behavior is common upon incarceration, and that he and officer John Daianu believed that Mrs. Harris was merely excited and would calm down if left alone and permitted to see her family, as most arrestees do. The City argued at trial that she chose to slump each time and was fully conscious and aware of her actions.

Captain Maxson testified that after a few minutes in Booking, Mrs. Harris was taken to a cell. She testified that while she was incarcerated, she was twice taken from her cell for searches of her person. After bond procedures were completed, Mrs. Harris was released at about 9:00 a.m., having been at the city jail for about 30 to 40 minutes. A little more than an hour had elapsed since she was stopped while driving.

Mrs. Harris's family had her taken to Timken Mercy Hospital by ambulance from the jail. Mrs. Harris was hospitalized for one week. She was diagnosed as suffering from gross stress reaction, anxiety and depression, with symptoms including immobility and respiratory difficulty. Psychiatric therapy was necessary periodically for more than a year.

Mrs. Harris, together with her husband and daughter, brought a civil action against the police officers, city officials and the City of Canton under 28 U.S.C. §§ 1981, 1983, 1985-86, and the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments. She claimed the following constitutional violations: unlawful seizure, cruel and unusual punishment, deprivation of liberty and physical well-being without due process, failure to provide equal protection of the law due to race, and unlawful search. In addition to these federal constitutional violations, Mrs. Harris claimed false imprisonment, assault and battery under state law. The complaint also charged the police with assaulting and battering the teenage daughter who was a passenger in the car with her.

Damages were based on physical and emotional injuries, pain and suffering, treatment expenses, loss of ser-

vices to Mrs. Harris, exemplary damages, and legal costs and fees. Compensatory damages of one million dollars and exemplary damages of two million were sought. In addition, plaintiffs requested injunctive and declaratory relief in regard to the police policies and practices. The suit was dismissed due to untimely filing under the applicable Ohio statute of limitations, but on appeal the Harrises prevailed and the case was remanded for further proceedings. *Harris v. City of Canton,* 725 F.2d 371, 6th Cir. 1984).

A jury trial was held. In addition to the testimony described above, there was evidence presented as to the policies of the Canton police department in regard to medical treatment for prisoners. Section 334.7 of the Canton Police Regulations provide as follows:

> He [the jailer] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

Former police Chief Wyatt testified to the department's usual practice of implementing section 334.7. He stated that shift commanders are authorized to make medical decisions under section 334.7 in their sole discretion based on personal observation. In the face of this grant of discretion, there was no evidence offered that the City provided any training or instructions to shift commanders, other than minimal first aid instruction, to prepare them for making such determinations.

At the close of the evidence, the court denied the defendants' motion for directed verdict. The jury rejected

all the Harrises' claims except one: the jury found that Mrs. Harris was unreasonably denied medical attention while incarcerated at the city jail, and it awarded her $200,000 against the City of Canton. The court denied the city's motion for remittitur, new trial, or judgment n.o.v., and this appeal followed. The City raises numerous issues, including the insufficiency of plaintiffs' evidence to raise a jury question on her claim of deprivation of medical attention, and improper instructions to the jury on Harris's theories of municipal liability.

In regard to her claim of an unconstitutional deprivation of medical care, *see Estellee v. Gamble,* 429 U.S. 97, 104-05 (1976); *Westlake v. Lucas,* 537 F.2d 857 (6th Cir. 1976), Mrs. Harris contended that given her obvious signs of anxiety, hyperventilation and loss of ambulatory function, the officers should have referred her for medical care. She said that Maxson never even took her pulse in order to determine whether she needed care. Furthermore, she testified that the officers laughed at her and ridiculed her. Harris based municipal liability for the deprivation of medical care on two theories: (1) inadequate training by the City of its police officers, which proximately caused the deprivation; and (2) the participation of supervisory personnel in the deprivation.

I. Inadequate Training

Where a municipality has wholly failed to train or has been grossly negligent in training its police force, it may be concluded that there was a municipal custom that allowed or condoned certain violations of constitutional rights by police. *E.g., Rymer v. Davis,* 754 F.2d 198, 201 (6th Cir. 1985), *vacated,* 105 S.Ct. 3518 (1985), *reinstated*

on remand, 775 F.2d 756 (6th Cir. 1985); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982). To succeed in a claim that a municipality is liable for failure to train its police force, the plaintiff must prove that the municipality acted recklessly, intentionally, or with gross negligence. *See Hays*, 668 F.2d at 872 (6th Cir. 1982) (holding that "simple negligence is insufficient" to support liability of municipalities for inadequate training and supervision of individual officers). In addition, the plaintiff must demonstrate that the municipality's inadequate training of its officers was causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result. *Rymer*, 754 F.2d at 201.

Harris's theory of grossly inadequate training was based on the fact that the police had an established policy of allowing shift commanders unfettered discretion under rule 334.7 to make the decision to refer a prisoner to the hospital based on their personal judgment and perceptions, coupled with the fact that these commanders were given no training or guidelines for making this decision. The former police chief testified to the discretion in decision-making, and the city could not show any evidence of adequate training. Mrs. Harris's evidence on these two facts thus raised a valid jury issue of municipal liability under *Rymer* and *Hays* for grossly negligent failure to train. The district court did not err in finding that there was sufficient evidence to submit that theory to the jury and in denying a directed verdict. We have reviewed the court's instructions on this theory of liability, and we find them adequate.

II. Participation of Supervisory Personnel

Harris's suit was alternatively based on her claim that, when a supervisory officer actually participates in the deprivation, the City is liable for his acts because he is a supervisor. That position is incorrect. Mrs. Harris relies on the case of *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982), in which this court stated as follows:

> The district judge specifically found that [the supervisory officer] was directly responsible for *and personally participated in the deprivation* of the Smiths' constitutional rights. He both subjected and caused the appellees to be subjected to the deprivation of their civil rights and is thus liable under section 1983.

Id. at 225. This passage provides for liability under section 1983 when the supervisory officer participated in the wrongdoing. In *Smith*, however, the officer was appealing a judgment finding him personally liable. Municipal liability was not at issue. *Id.* at 221.

It is clear that for the City to be liable, there must be a City policy or custom that causes the deprivation. *See, e.g., Hays*, 668 F.2d at 872-73. In *Hays*, both the municipality and the individual supervisors were sued. The court first discussed the personal liability of the supervisory officers at length, explaining that their liability cannot be based merely on the fact that they had the right and duty to supervise the officers who allegedly committed the violation of the Constitution. Their individual liability must be based on their own grossly negligent conduct. *Id.* In other words, the supervisory officers could not be found personally liable on the basis of the doctrine of respondeat superior. Immediately following this discussion of the

liability of the supervisory officers, the court stated that the liability of the municipality must also be based on its own conduct, that is, on a municipal policy or custom rather than on the acts of its employees:

> The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo v. Goode*, 423 U.S. at 370-71, 96 S.Ct. at 603-04. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 96 L.Ed. 2d 611 (1978).

Hays, 668 F.2d at 872. While it is clear that a city "can act only through its principal officials," *id.* at 875, a supervisor does not automatically render the city liable under section 1983 merely by engaging in misconduct. If he is a policy-maker and his act may be construed as setting or implementing a policy, then the act of a supervisor may render the city liable under certain circumstances, *see Pembauer v. City of Cincinnati*, 106 S.Ct. 1292, 1300 (1986), but we have no allegations or proofs of such a theory before us.

We find that Harris's alternate theory of municipal liability was legally defective. It should not have gone to the jury, and thus the question of the sufficiency of the evidence on this theory of liability is irrelevant. The pertinent part of the jury instructions is as follows:

> Accordingly, the burden of proof is upon Geraldine Harris to prove, by a preponderance of the evidence, that for the City of Canton and its police department to be held liable under Section 1983, *its police department and/or its supervisory personnel either in some way participated in the actual misconduct, if any,* or failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. Under such conditions, and only under such conditions, the City of Canton may fairly be determined as acquiescing in and implicitly authorizing such violations.
>
> • • • •
>
> Thus, if you find from the preponderance of the evidence that the city, acting through its police department and its supervisory personnel, actually participated in the alleged misconduct, you may conclude that the city and its supervisory personnel acquiesced in that misconduct and your finding will be for Geraldine Harris. Otherwise, you shall find in favor of the City of Canton.
>
> • • • •
>
> You are further instructed that you may not return a verdict against the City of Canton if you believe, from a preponderance of the evidence, that Mrs. Harris was denied medical treatment by a Canton police officer merely because of the fact that said police officer was an employee of the City of Canton. In other words, if you believe that the Canton Police Department adequately supervised, trained and controlled the police officers, then you shall return a verdict for the City of Canton even though you may believe, from a preponderance of the evidence, that an individual police officer in the employment of the city knowingly denied medical treatment to Geraldine Harris.

Tr. at 4-388-90 (emphasis added). The City argues that this instruction impermissibly allowed the jury to find the

City liable for the misconduct of its employees under the doctrine of respondeat superior. *See Monell v. Dept. of Social Services,* 436 U.S. 658 (1978).

In the first sentence of the passage quoted above, the part of the sentence following the word "or" provides a correct basis for municipal liability under Mrs. Harris's first theory of liability, discussed above; however, the part preceding the "or" provides an alternate basis for municipal liability that is incorrect. This instruction allows a finding of municipal liability merely because its supervisory personnel did a bad act, with no need to find that the city was a bad actor through a city policy or custom. This was error. We cannot know on which basis of liability the jury found the City liable, and accordingly, we must reverse.

We recognize that the trial court gave a correct statement of *Monell* when it stated, in the final quoted paragraph, that the City was not liable merely for employing officers who acted wrongfully. We conclude, however, that the instructions, read as a whole, could have misled and confused the jury as to the applicable principles of law.

The City has raised several other issues. We have considered them, and find no other error. The judgment of the district court is REVERSED and this case is REMANDED for a new trial.

MERRITT, Circuit Judge, concurring in part and dissenting in part. I concur in Part II of Judge Jones' proposed opinion for the Court. On Part I respecting the claimed unconstitutionality of the City's policy of handling

the medical needs of the prisoners, I do not find the policy contained in § 334.7 of the Canton Police Regulations to be unconstitutional, nor do I find a custom of unconstitutional application of the policy. I read Judge Jones' opinion for the Court to conclude that a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury on remand. I cannot think of any way that the City could more specifically regulate or direct the exercise of this authority without providing paramedical officers or medical specialists of some type at the jail.

The exercise of such authority respecting medical care must be delegated to jailors or other intake officials if it is to be effectively exercised at all by the City. We should not erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail. It seems to me that ordinary common sense review and handling of cases on an individual basis by intake officers should pass constitutional muster. Intake officers must meet the "deliberate indifferent standard" of *Estelle v. Gamble,* 429 U.S. 97 (1976), but I see no need to embed within this standard a subsidiary special training requirement. Nor do I believe that the case should be submitted to a jury under a general charge so that the jury is allowed to create such a requirement *sub silentio* as a part of its general verdict.

A TRUE COPY
Attest:
JOHN P. HEHMAN,
Clerk
By /s/
Deputy Clerk

ISSUED AS MANDATE: September 5, 1986
COSTS: None

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-18-A

JUDGE SAM H. BELL
GERALQDINE HARRIS, *et al.*,
Plaintiff

—v—

CITY OF CANTON, *et al.*,
Defendant

[Filed Mar. 14, 1986]

ORDER

The above-entitled civil rights action is currently before the court on a motion filed by the City of Canton for judgment notwithstanding the verdict and alternative motion for new trial. This motion is less than two pages long and contains no citation to either case law or to specific evidence presented at trial. For the reasons which follow the motion is hereby denied.

On August 28, 1984 a trial by jury was commenced for nine days involving numerous federal and state causes of action by Geraldine Harris, her husband Willie and daughter Bernadette against the City of Canton and several individual police officers and supervisory personnel of the City. On September 12, 1984, the jury returned a verdict against the City of Canton on the claim of denial

of medical treatment and awarded Mrs. Harris damages of two hundred thousand dollars. The jury factually found that the City of Canton had violated Mrs. Harris' constitutional rights by denying her necessary medical treatment while she was incarcerated at the City Jail. In addition, the jury found in favor of the defendants on all of the remaining claims.

The grounds stated by the City for granting a motion for judgment notwithstanding the verdict are as follows:

1. There can be no liability against the City of Canton on an employer/employee theory.

2. There was no evidence of a custom, policy, or practice on the part of the City of Canton that it denies medical treatment to prisoners of its jail.

3. The "medical treatment" part of the charge was erroneous and confused the jury.

4. On April 26, 1978, the City of Canton was not a person amendable to suit pursuant to Section 1983.

The first issue raised by the City is presumably the argument that their liability was based upon a respondeat superior basis. The law is clear that in a civil rights action brought under 42 U.S.C. § 1983 a municipality may not be held liable for the negligent acts of an employee. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In *Monell* the Supreme Court expressly rejected respondeat superior as a basis for muncipal liability in Section 1983 actions. The Court stated as follows:

> By our decision in *Rizzi v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), we would appear to have decided that the mere right to control without

> any control or direction having been exercised and without failure to supervise is not enough to support § 1983 liability.

436 U.S. at 694 n.58, 98 S.Ct. at 2037, 56 L.Ed.2d at 637.

In this action, the court ruled at trial that the City of Canton may not be held liable on the basis of respondeat superior. Consistent with that ruling, the court has reviewed the instructions given to the jury and does not find that any such instructions was given. In fact the court specifically instructed the jury that the City of Canton was not responsible for oversights or simple negligence in the supervision of personnel under the mandates of section 1983. Thus, the court finds that this ground for judgment notwithstanding the verdict is not applicable to the present action and is without merit.

The second and third grounds raised by the City of Canton are related and shall be dealt with herein together. In the second ground it is asserted that the evidence presented at trial was not sufficient to create a jury issue that the City of Canton through a policy or practice denied medical treatment to Mrs. Harris. In the third ground it is asserted that the court erroneously construed and applied the law as it concerns the medical treatment to be afforded by a municipality.

When a trial court is ruling on a motion for directed verdict or a motion for judgment notwithstanding the verdict, the evidence must be viewed in a manner most favorable to the non-moving party. *Coffey v. Multi-County Narcotics Bureau,* 600 F.2d 570, 579 (6th Cir. 1979); *Krotkoff v. Gloucher College,* 585 F.2d 675, 677 (4th Cir. 1978); *Hull v. Holiday Inns of America,* 478 F.2d 224

(6th Cir. 1973); *Smitty Baker Coal v. United Mine Workers,* 457 F.Supp. 1123, 1130 (D.C. Va. 1978), *aff'd.* 620 F.2d 416 (4th Cir. 1980), *cert. denied* 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980). The evidence viewed in this manner showed that Mrs. Harris, while incarcerated at the Canton Jail, became incoherent and lost the ability to stand or control her body movements which ultimately resulted in her slumping to the floor. While Mrs. Harris was in this condition, a supervisor of the police department was, pursuant to police policy, contacted by the jailers and he was able to examine the plaintiff. At that time, the supervisor was unable to communicate with the plaintiff due to her condition or get her to answer simple questions or move her body. Thereafter, the supervisor, using his common sense and best judgment, determined that Mrs. Harris did not need medical treatment and she was left lying on the floor. The supervisor had no special training in recognizing when medical treatment was necessary. Shortly thereafter, family members of the plaintiff called an ambulance and Mrs. Harris was removed to the hospital where she was admitted for approximately one week. At trial the plaintiff's physicians testified that when Mrs. Harris arrived at the hospital she required medical assistance.

Before a municipality can be held responsible for violation of an individual's constitutional rights, it must be demonstrated that the constitutional violation was caused by a custom policy or practice of the City. *Monell v. Department of Social Services, supra.* A "custom, policy or practice" of a municipality does not only include the "policy statement, ordinance, regulation or decision adopted and promulgated by the City's governing body"

but also includes the deprivations of constitutional rights caused by a governmental custom. *Williams v. Butler,* 746 F.2d 431, 435 (8th Cir. 1984). A governmental custom does not require the formal approval of the City's officials or formal ratification by some official decision-making body. *Rymer v. Trooper H.A. Davis,* —— F.2d ——(6th Cir. February 11, 1985); *Williams v. Butler, supra.*

The Sixth Circuit has ruled that a municipality may be liable for the actions of its police force when there is a complete failure to train the police or when such training is so reckless or grossly negligent that future police misconduct is almost certain to result. *Hays v. Jefferson County,* 668 F.2d 869 (6th Cir. 1982); *cert. denied,* 103 S.Ct. 75 (1983). The vesting of complete *carte blanche* authority within a supervisory person in the police department without any special training may be determined by the fact finder to be reckless or grossly negligent. A municipality may be found liable by a jury when it permits decisions concerning the medical treatment of prisoners to be rendered by supervisors exercising only their common sense. *Rymer v. Trooper Davis, supra.*

Applying these legal standards to this action, the court held that a jury issue was present and instructed the jury accordingly. The evidence construed in a manner most favorable to Mrs. Harris could be found by a jury to demonstrate that the City of Canton had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners. Further, the jury could find from the evidence that the vesting of such *carte blanche* authority

with the police supervisor without adequate training to recognize when medical treatment is needed was grossly negligent or so reckless that future police misconduct was almost inevitable or substantially certain to result. Thus, the court finds that the second and third grounds for a judgment notwithstanding the verdict are not well founded.

The final argument raised by the City of Canton is that a municipality is not a person amenable to suit under Section 1983. Presumably this argument is based upon the holding in *Monroe v. Pape,* 365 U.S. 167 (1960), wherein the Supreme Court found that Congress did not intend to bring a municipality under the ambit of Section 1983. *Id.* at 187-192. However, since the ruling in *Monroe* the Supreme Court has expressly overruled that holding and has found that a municipality is a person within the meaning of the statute and may be sued for constitutional deprivations. *Monell v. Department of Social Services, supra* at 664-689. *Also see: Brandon v. Holt,* 469 U.S. ——, 105 S.Ct. ——, 83 L.Ed.2d 878 (1985); *Williams v. Valdosta,* 689 F.2d 964 (11th Cir. 1982); *Hays v. Jefferson County, supra, Powe v. Chicago,* 664 F.2d 639 (7th Cir. 1981); *Black v. Stephens,* 662 F.2d 181 (3d Cir. 1981), *cert. denied* 456 U.S. 950, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1981). Since the City of Canton has cited no case law nor has the court discovered any law that would demonstrate that the cases cited above are no longer the law, the final ground for judgment notwithstanding the verdict is dismissed.

In the alternate motion for new trial, the City of Canton raises two grounds. The first ground is that the evi-

dence was insufficient to render a verdict against the City. The court has already discussed the evidence construed pursuant to *Coffy v. Multi-County Narcotics Bureau, supra,* at 579, and finds that the evidence was sufficient to submit to the jury the issue of the City of Canton's liability. Further, the court finds that this evidence is sufficient to support the jury's verdict.

The final ground raised by the City of Canton is that a new trial is proper because the judgment is excessive. In this circuit, the standard to be applied if the fact finders award of damages is "so large as to shock the judicial conscience." *Thompson v. National R.R. Passenger Corp.,* 621 F.2d 814, 827 (6th Cir. 1980); *Also see Stengel v. Belcher,* 522 F.2d 438, 444 (6th Cir. 1975), *cert. dismissed,* 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976); *Kroger Co. v. Rawlings,* 251 F.2d 943, 945 (6th Cir. 1958). Although the court concedes that the amount of $200,000 is a large award for the injuries sustained by Mrs. Harris, the court does not find that the award rises to a level that shocks the judicial conscience. Thus, the court does not find that the verdict was excessive. In making this finding it should be noted that the City of Canton has failed to offer any evidence of bias, passion or prejudice on the part of the fact finders. In addition, the City has not shown where the ward is significantly larger than cases involving similar injuries. Hence, this court shall permit the jury's verdict to stand.

Accordingly, the City of Canton's motion for judgment notwithstanding the verdict and alternative motion for new trial are hereby denied.

IT IS SO ORDERED.

/s/
SAM H. BELL
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3314

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Plaintiffs-Appellees,

v.

STANLEY CMICH, *et al.,*
Defendants,

CITY OF CANTON,
Defendant-Appellant

[Filed Aug. 22, 1986]

ORDER

BEFORE: LIVELY, Chief Judge; MERRITT and JONES, Circuit Judges

The City of Canton has petitioned the Court to rehear its decision of July 2, 1986, affirming in part the judgment of the district court.

The Court has considered the petition for rehearing offered in support thereof. A majority of the panel finds that the issue of adequate training was properly before this court on appeal, and so the petition is found not to be well taken.

It is therefore, ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman,
Clerk

REPLY BRIEF

No. 86-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioner

* Counsel of Record

April 10, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

IN THE

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REPLY BRIEF OF PETITIONER

In the City's petition for certiorari, it argued primarily that this case should be held pending the outcome of *City of Springfield* v. *Kibbe*, No. 85-1217, and then disposed of in light of that decision. On February 25, 1987, the Court dismissed the writ in *City of Springfield* as improvidently granted. 107 S. Ct. 1114 (1987). The majority explained that the issue the Court granted certiorari to resolve—whether a city can be held liable under 42 U.S.C. § 1983 for providing inadequate police training, and, if so, what standard should govern the imposition of such liability—was in fact not adequately preserved by the petitioner. After the argument in and just prior to the disposition of *City of Springfield*, the Court granted certiorari in *City of St. Louis* v. *Praprot-*

nik, No. 86-772, in which one issue is whether a city may be liable under Section 1983 for "final" discretionary actions of employees taken within the scope of their delegated authority. 55 U.S.L.W. 3472 (Jan. 13, 1987).

As respondents candidly admit, liability against the City of Canton is predicated solely upon "[t]he grant of discretion to the shift commander to evaluate Mrs. Harris' medical condition coupled with *the City's failure* to show any evidence of adequate training . . . ." Br. in Opp. 5 (emphasis in original).[1] Thus, the court of appeals has adopted a theory of municipal liability under Section 1983 that shifts the burden to the city to prove that its training is adequate whenever the city delegates decision-making discretion to municipal employees. This case is therefore a bridge between the issue posed in *St. Louis* and the issue raised but not decided in *Springfield*. As in *St. Louis*, the effect of a delegation of authority to city employees is crucial to this case and, as in

[1] Respondents' statement of the case, which is completely devoid of citation to the record, contains various allegations of Mrs. Harris' mistreatment by the City that are not before the Court. Br. in Opp. 3. Not only were such allegations flatly contradicted at trial, but the jury found against Mrs. Harris on all claims arising out of these allegations and on all claims against the individual defendants. Pet. App. 2a-3a. *See City of Los Angeles* v. *Heller*, 106 S. Ct. 1571 (1986).

The only issue before the Court is whether respondents may recover, under the theory set forth by the court of appeals, on the claim that Mrs. Harris was "unreasonably denied medical attention while incarcerated at the city jail." *See* Pet. App. 4a. The case before the Court does not involve *any* factual issue relating to the jury verdict, the jury instruction or respondents' belated attempt to reargue the facts. On the contrary, this petition presents the purely legal question of whether the court of appeals theory of municipal liability—based on employee discretion and the absence of proof of "adequate" training—is consistent with congressional intent to limit municipal liability under Section 1983 to a city's *own* acts. *See Monell* v. *Department of Social Services*, 436 U.S. 658, 690-95 (1978).

Springfield, the case presents the issue of the appropriate standards for determining when Section 1983 liability against a city is warranted for a claim of inadequate training. In fact, this case is a perfect vehicle for resolving the issue originally accepted for review in *Springfield*. As respondents concede, "*Kibbe* involves unconstitutional conduct *arising out of grossly negligent training* as opposed to a *regulation coupled with inadequate training* [which is involved in this case]. (Br. in Opp. 6; emphasis in original). The basic issue of municipal liability under Section 1983 for inadequate training of employees could not be more clearly and directly presented than it is in this case.

The court of appeals held unambiguously that municipal liability is appropriate if there is delegated authority to a city employee and the city fails to meet its burden of proving that the employee's training was adequate. Such a standard of Section 1983 liability requires no finding that the city has acted indifferently or recklessly with regard to the rights of the city's residents. In fact, it requires no evidence of knowledge by the city. As such, the holding below conflicts with decisions of other courts of appeals which have required proof of deliberate indifference by city officials before imposing municipal liability under Section 1983. See *City of Springfield* v. *Kibbe*, 107 S.Ct. at 1121 (O'Connor, J., dissenting) (collecting cases requiring "deliberate indifference" as the basis for finding a "custom" or "policy" of local government).[2]

[2] Respondents also assert that the City's regulation conferring discretion upon the shift commander is "vague and unconstitutional." Br. in Opp. 6. This assertion is plainly wrong. The regulation *requires* a shift commander to seek medical assistance for a detainee in certain clear circumstances—when the victim is unconscious or semi-conscious, when the victim complains of illness or when the victim is unable to explain his condition. In all other circumstances, the police shift commander is required to use his judgment as to whether medical assistance is warranted. The

Because the Sixth Circuit's theory of municipal liability is so broad, the practical effect of the court of appeals' decision on cities and counties will be tremendous. As Judge Merritt explained in dissent, the decision below erects a "requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail." Pet. App. 10a. In the absence of clear evidence that such paramedical training is necessary to protect detainees' constitutional rights, this financial burden on local governments in Ohio, Kentucky and Tennessee is wholly unjustified.

In short, there are more compelling reasons to grant the petition in this case than there were in *City of Springfield*. Moreover, the issues presented in this case are complementary to the issues currently before the Court in *City of St. Louis*. Because *City of St. Louis* will not be argued until next Term, the Court might wish to consider granting the petition in this case and having the cases heard in tandem. Alternatively, the Court at least should hold the petition pending its decision of *St. Louis* and then dispose of this petition as appropriate in light of that case.

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regulation is neither unconstitutional nor impermissibly vague. Municipal governments simply cannot codify every day-to-day employee decision; at some point, government employees must exercise discretion. Thus, the City's failure to require specifically by regulation that medical treatment be provided to persons (like Mrs. Harris) who appear to be having difficulty sitting in a chair because of anxiety over being arrested is hardly a basis for liability under Section 1983.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held pending the decision in *City of St. Louis* v. *Praprotnik*, No. 86-772, and then disposed of as appropriate in light of that decision.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioner

* Counsel of Record

April 10, 1987

JOINT

APPENDIX

No. 86-1088 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioners

STEVEN M. FITTEN *
EMMANUELLA HARRIS GROVES
DEXTER W. CLARK
CLARK & KOVACIK
22650 Lorain Road
Fairview Park, Ohio 44126
(216) 734-2100
Counsel for Respondents

May 5, 1988

* Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 2, 1987
CERTIORARI GRANTED MARCH 7, 1988

3708

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C 80-18A

HARRIS, GERALDINE
HARRIS, WILLIE G.
HARRIS, BERNADETTE,

Plaintiffs

v.

CITY OF CANTON, OHIO
CMICH, STANLEY
CANTON POLICE DEPARTMENT
MASER, DAVID,

Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
01-08-80	1	COMPLAINT filed. Summons issued. 9 Copies of complaint with 9 copies of summons issued to U.S. Marshal.
1-9-80	2	ORDER that Clerk transfer action to the Clerk in Cleveland for reassignment to another Judge filed. Contie, J. Copies mailed 1-9-80.
1/16/80	3	PRETRIAL ORDER filed. Manos, J.
1/22/80	4	ANSWER of The City of Canton & all Defts., in their official & individual capacities filed. c/m 1/21/80

DATE	NR.	PROCEEDINGS
1/30/80	5	SUMMONS returned and filed. served David Maser 1/9/80; served Raymond Samolia 1/9/80; served James R. Schnabel 1/9/80; served Mike Norcia 1/9/80; served J. Dianu 1/9/80; served Robert Kuehner 1/9/80; served Stanley Cmich, Mayor 1/9/80; served Canton Police Dept. 1/9/80;—FEES: $27.00
3/27/80	6	MOTION of Pltfs for an extension of time to complete discovery with affidavit in support filed. c/m 3/24/80
3/28/80	7	ORDER extending the time for completion of discovery until 5/1/80 filed. Manos, J.—copies mailed.
4/11/80	8	TRIAL BRIEF of Defts., in support of First Defense of City of Canton and all defts., in their official and individual capacities filed. copy mailed 4/10/80
5/2/80	9	MOTION of pltfs. for leave to plead and joint motion for extension of time to complete discovery filed. Copy mailed 4/28/80.
5/9/80	10	TRIAL ORDER filed. Manos, J. (Case is scheduled for trial on 7/21/80 at 9:00 A.M., two copies of trial briefs are to be filed on 7/14/80, etc.) copies mailed.
5/16/80	11	MOTION of Defts., City of Canton, Stanley Cmich, Indiv, & in his official Capacity, Canton Police Dept. & David Maser to dismiss, with memorandum in support filed. copies mailed 5/14/80
5/19/80	12	MOTION of Pltfs., to strike & memorandum of Law, in opposition to Defts' Trial brief in support of first defense filed. copy mailed 5/15/80

DATE	NR.	PROCEEDINGS
5/27/80	13	MOTION of Pltfs., for an extension of time to complete discovery, until 6/16/80 and motion for leave to reply to defts motion to dismiss defts., City of Canton, Stanley Cmich & David Maser, with affidavit in support filed. copy mailed 5/23/80
6/2/80	14	ORDER extending the completion of all discovery herein until 6/16/80; further order the pltfs be permitted to reply to defts' motion to dismiss on or before 6/13/80 filed. Manos, J.—copies mailed.
*5/30/80	15	INTERROGATORIES of Pltf., (First set) propounded to Deft. David Maser filed. copy delivered 5/30/80
6/2/80	16	SUBPOENAS to produce on behalf of Pltfs., returned and filed. Served Major Paul Higgins, Canton Police Dept., 5/29/80
6/17/80	17	ANSWERS of David Maser to Pltf's (first) set of Interrogatories filed. copies mailed 6/13/80
6/18/80	18	MOTION of Pltfs., for leave to respond to Deft's motion to dismiss, with affidavit in support, until 6/18/80 filed.—copy mailed 6/18/80
7/1/80	19	MOTION of pltfs. for leave to respond to deft.'s motion to dismiss & motion to amend complaint and memo. of law in opposition to deft.'s motion to dismiss filed. Copy mailed 6/29/80. (Amended complaint attached).
7/14/80	20	TRIAL BRIEF of Defts., filed.

DATE	NR.	PROCEEDINGS
7/15/80	21	MOTION of Pltfs., to compel inspection and production of documents, with memorandum of Law in support filed. copy mailed 7/14/80
7/15/80	22	TRIAL BRIEF of Pltf., filed.
7/21/80	23	MOTION of Defts., to dismiss, with memorandum in support filed. copies mailed 5/14/80
8/11/80	24	MOTION of Pltf., to strike motion to dismiss; brief in support of Federal and pendent claims affected by applicable statute of Limitations & Savings Provision, with memorandum of Law in support filed. copy mailed 8/11/80
*8/19/80	25	MOTION of Defts., for an extension of time until 8/26/80 to file reply brief filed. copy mailed 8/18/80
8/21/80		ENDORSED Order granting motion of defts., leave until 8/26/80 to file reply brief filed. Manos, J.—copies mailed.
8/26/80	26	REPLY Brief of Defts., City of Canton, to motion to strike motion to dismiss filed. copy mailed 8/25/80
9/2/80	27	MOTION of Pltfs., for leave to file amended brief in support of Federal and pendent claims affected by applicable statute of limitations and savings provision of R.D.2305.19 filed. copies mailed 8/29/80
7/27/82	28	MEMORANDUM of Opinion granting motion of defts. to dismiss filed. Manos, J. (7/27/82).
7/27/82	29	ORDER granting motion of defts. to dismiss filed. Manos, J. (7/27/82).

DATE	NR.	PROCEEDINGS
8/26/82	30	NOTICE of appeal by pltfs. filed. Copies sent 9/8/82 to USCA, Fitten & Albu.
*8/11/80	31	MOTION of pltfs. for relief from order 60(b) Fed. R. Civ. P. filed Copy mailed 8/11/80.
*8/11/80	32	BRIEF in support of motion for relief from order filed. Copy mailed.
*10/9/81	33	ORDER denying motion of pltfs. for relief from order nunc pro tunc as of 9/1/80 filed. Krupansky, J.
9/13/82		CERTIFIED original pleadings mailed to USCA.
9/22/82	34	CERTIFIED original pleadings received (9/14/82) by USCA #82-3560.
9/22/82	35	CERTIFIED original pleadings filed (9/13/82) by USCA #82-3560.
2/9/84		TRUE copy of Mandate from USCA vacating & remanding case to Distict Court for further proceedings in accordance with the opinion of this court, filed. Each Party to bear its own costs on this appeal. Kennedy & Jones, CJS. & Cohen, District Judge. Issued as Mandate: 2/6/84. Costs: None. Record Returned. (n. 2/9/84).(1/13/84).
2/9/84		SLIP OPINION, filed.
3/19/84	36	TRIAL Order filed. Trial on for 5/2/84 9:15 am Briefs submitted 4/25/84. Manos, J. (n.3/19/84).
3/30/84	37	NOTICE of William C. H. Ramage of Harrington, Huxley & Smith 1200 Mahoning Bank Bldg. enteres his appearance ast attorney for deft. Stanley Cmich.

DATE	NR.	PROCEEDINGS
4/24/84	38	TRIAL BRIEF of Stanley Cmich, individually and in his official capacity as Mayor of the City of Canton, Ohio filed. c/m 4/23/84.
4/26/84	39	SUPPLEMENTAL Trial Brief of Plaintiff filed. c/m 4/26/84.
4/27/84	40	NOTICE of Plaintiff to take Video Tape Deposition upon Oral Deposition on 4/28/84 filed. c/m 4/27/84
4/27/84	41	BRIEF of Plaintiff in support of notice to take Deposition upon Oral Examination filed. c/m 4/27/84.
4/27/84	42	ORDER to take Video Tape Deposition on 4/28/84 filed. Manos, J. (n. 4/30/84).
5/1/84	43	VOIR DIRE (proposed) questions of the Plaintiff filed. c/m 5/1/84.
5/1/84	44	JURY INSTRUCTIONS (proposed) of the Plaintiff filed. c/m 5/1/84.
5/1/84	45	EXHIBITS, Plaintiff's list of proposed exhibits filed. c/m 5/1/84.
5/2/84	46	VOIR DIRE questions (proposed) of Defendant Stanley Cmich filed. c/m 4/30/84.
5/2/84	47	EXHIBITS (proposed) of Defendants filed.
5/3/84	48	SUBPOENA to produce on behalf of the Plaintiff returned and filed by Dexter W. Clark. Served W.J.K.W. (Sherie Molesky) personally on 4/27/84.
5/4/84	49	MOTION of Plaintiff for disqualification of Judge and Brief in support filed. c/m 5/3/84.

DATE	NR.	PROCEEDINGS
5/4/84	50	ORDER that the above-captioned case be returned to the Clerk of Courts for reassignment by random draw pursuant to L. Civ. R. 7.09(1) filed. Manos, J. (n. 5/4/84).
5/4/84		File mailed to Clerk of Court, United States District Court, Akron, Ohio on 5/4/84; Case reassigned to Judge Bell.
5/22/84	51	ANSWER of defendant Stanley Cmich individually and in his official capacity as former Mayor of Canton, OH to amended complaint filed. Copies mailed 5/16/84.
5/25/84	52	ANSWER of defendants City of Canton, Ohio; David Maser, individually and in his official capacity as Chief of Police; Canton City Police Department; Patrolman James R. Schnabel; Patrolman Mike Norcia; Patrolman J. Daianu and Patrolman Robert Kuehner, individually and in their official capacity as members of the Canton Police Department with attachments filed. Copies mailed 5/24/84.
5/25/84	53	MOTION of defendants City of Canton, OH; David Maser, Patrolmen Schnabel, Samolia, Norcia, Daianu and Kuehner for more definite statement of the amended complaint with brief and attachments in support filed. Copies mailed 5/24/84.
5/25/84	54	MOTION of defendants City of Canton, OH, Canton Police Department and David Maser individually and in his official capacity as Chief of Police of Canton City Police Dept. to dismiss complaint with memorandum of law in support filed. Copies mailed 5/24/84.

DATE	NR.	PROCEEDINGS
6/6/84	54	MOTION of plaintiffs for extension of time to 6/26/84 to file briefs in opposition filed. Copies mailed 6/6/84. 6/8/84, ENDORSED ORDER GRANTING motion filed. Bell, J. Copies mailed 6/11/84.
6/21/84	55	SECOND MOTION of plaintiff for extension of time to 7/6/84 to file briefs in opposition filed. Copies mailed 6/21/84. 6/27/84, ENDORSED ORDER GRANTING motion with NO FURTHER DELAYS filed. Bell, J. Copies mailed 6/27/84.
7-16-84	56	MOTION of plaintiff to strike defendants' amended answer and motion for a more definite statement; memorandum contra to defendants' motion to dismiss defendants, City of Canton, Canton Police Dept. and David Masser with memorandum in support filed. Copies served 7-12-84.
8/8/84	57	ORDER that case is scheduled for trial in Cleveland 8/28/84 at 9:00 a.m. filed. Bell. J. Copies mailed 8/9/84.
8/21/84		NOTICE that case has been set for final pre-trial conference with clients in personal attendance 8/27/84 at 3:30 p.m. at Cleveland mailed.
8/28/84	58	SUBPOENAES (19) to testify of behalf of plaintiff 8/28/84 at 9:00 a.m. returned and filed. Served Stanley Cmich; R. Kepler; Tom Rollo; Sheldon Gatschall; Thomas W. Wyatt; Director of Medical Records & Billing; Timken Mercy Medical Center; Capt.

DATE	NR.	PROCEEDINGS
		Alan Maxon; Frank Burnasky; Edward Coleman; Dave Maser; Clerk of Court, Canton Municipal Court; Robert Fisher; Capt. Alan Maxson; Walter Cherry; Paul Higgins, Director of Motor Vehicle Maintenance; Donald Wartz; M. Fox; Ronald Inman and Melvin Gravely who refused to accept subpoena. FEES: $665.00.
8/28/84	59	SUBPOENA returned and filed. Served Ron Ponder 8/28/84. FEES: $35.00.
**8/30/84	60	WITNESS List of defendant filed. Copies mailed 8/30/84.
8/28/84	61	MINUTES of proceedings filed. Bell, J. Salopek, R. Jurors and alternate jurors impaneled.
8/29/84	62	MINUTES Of proceedings filed. Bell, J. Salopek, R. Trial resumed from 8/28/84. Plaintiff called Dr. Shirley Gregory, Donald Wuertz, Geraldine Harris, Willie Harris, Ronny Harris, Dr. Saverio Caruso, Ronald Ponder, Edward Coleman, Allan Maxson. Trial continued to 8/30/84 at 9:00 a.m.
8/30/84	63	MINUTES of proceedings filed. Bell, J. Salopek, R. Trial resumed from 8/29/84. Plaintiffs called Thomas Wyatt, Richard Kepler. Trial continued to 8/31/84 at 9:00 am.
8/31/84	64	MINUTES of proceedings filed. Bell, J. Kraemer, R. Trial continued from 8/30/84. Plaintiff called the following witnesses: James Schrabel. Trial continued to 9/4/84.

DATE	NR.	PROCEEDINGS
9/4/84	65	MINUTES of proceedings filed. Bell, J. Kraemer, R. Trial resumed 9:00 a.m. Plaintiff's case continues. Recessed at 4:35 p.m. with instructions that trial shall resume at 9:00 a.m. on 9/5/84.
9/4/84	66	ORDER that U.S. Marshal for ND/OH, shall provide security to this court and to provide for ingress and egress at the U.S. Court House, Akron, 9/1/84 during the day as needed; FURTHER, this order is entered nunc pro tunc to 8/31/84 filed. Bell, J. Copies mailed 9/4/84.
9/5/84	67	MINUTES Of proceedings filed. Bell, J. Kraemer, R. Plaintiff's case resumed at 9:15 a.m. and adjourned at 4:30. Jury instructed to return at 10:00 a.m. 9/6/84.
9/5/84	68	MOTION of plaintiffs to show cause why Walter Cherry and Ronald Inman should not by held in contempt of court with exhibits attached filed. Copies mailed 9/6/84.
9/5/84	69	ORDER to show cause re Donald Inman to appear 9/6/84 at 9:00 a.m. at Cleveland filed. Bell, J. Copies mailed 9/5/84.
9/5/84	70	ORDER to show cause re Walter Cherry to appear 9/6/84 at 9:00 a.m. at Cleveland filed. Bell, J. Copies mailed 9/5/84.
9/6/84	71	MINUTES of proceedings filed. Bell, J. Kraemer, R. Plaintiffs' case resumed at 10:00 a.m. after show cause hearing at 9:00 a.m. Plaintiff rested at 1:30

DATE	NR.	PROCEEDINGS
** (over)		and defendant moved for directed verdict. Some parties and claims discussed by ruling of court at 4:45 p.m. Defendant's case to begin at 9:00 a.m. 9/7/84. Defendants dismissed, Bernossky, Maser, Cmich.
9/7/84	72	REQUEST of defendants for jury instructions filed. Copies mailed 9/7/84.
9/10/84	73	MOTION of plaintiffs to dismiss the City of Canton as a party defendant with brief in support of motion filed. Copies mailed 9/10/84.
9/10/84 ***	74	MINUTES of proceedings filed. Bell, J. Kreamer, R. The defendants renewed their motion for directed verdict. The motion is granted on the issues involving 42 U.S.C. Sec. 1985 and 1986.
9/11/84	75	REQUEST of defendants for submission of written interrogatories to the jury filed. Copies mailed 9/10/84.
9/13/84 **	76	REQUEST for injury instructions of defendants filed. Copies mailed 9/7/84.
9/7/84	77	MINUTES Of proceedings filed. Bell, J. Kraemer, R. Defendant's case begun at 9:00 a.m., concluded at 3:15 p.m. Defendants rest and their exhibits ruled on (none admitted); motions of defendant for directed verdicts.
9/12/84	78	VERDICT of jury in favor of plaintiff Geraldine Harris on her section 1983 Claim and against the city of Canton and award damages in the amount of $200,000.00; filed.

DATE	NR.	PROCEEDINGS
9/12/84	79	VERDICT that verdict is not being returned against defendants James Schnabel, Matthew Norcia, Raymond Samolia, Robert Kuehner and John Daianu filed.
9/12/84	80	VERDICT in favor of James Schnabel, Matthew Norcia, Raymond Samolia, Robert Kuehner and John Daianu and against plaintiff on her assault and battery claim filed.
9/12/84	81	VERDICT in favor of defendant James Schnabel and against Geraldine Harris on her section 1983 claim and award no damages filed.
9/12/84	82	VERDICT in favor of defendant Samolia and against plaintiff on her Section 1983 claim and award no damages filed.
9/12/84	83	VERDICT in favor of defendant Norcia and against plaintiff on her Section 1983 claim and award no damages filed.
9/12/84	84	VERDICT in favor of defendant Kuehner and against plaintiff on her Section 1983 claim and award no damages filed.
9/12/84	85	VERDICT in favor of defendant Daianu and against plaintiff on her Section 1983 claim and award no damages filed.
9/12/84	86	VERDICT in favor of defendant Norcia and against plaintiff on her Section 1983 claim and award no damages filed.
9/12/84	87	VERDICT in favor of defendant Raymond Samolia and against plaintiff on her Section 1983 claim and award no damages filed.

DATE	NR.	PROCEEDINGS
9/12/84	88	VERDICT in favor of defendant Schnabel and against plaintiff on her Section 1983 claim and award no damages filed.
9/12/84	89	VERDICT is not returned against defendants Schnabel, Norcia, and Samolia re Assault and Battery claim filed.
9/12/84	90	VERDICT in favor of defendants Schnabel, Norcia and Samolia and against plaintiff on her assault and battery claim filed.
9/12/84	91	VERDICT in favor of defendant Samolia and against plaintiff Willie Harris on his loss of consortium claim and award no damages filed.
9/12/84	92	VERDICT in favor of defendant Schnabel and against plaintiff Willie Harris on his loss of consortium claim and award no damages filed.
9/12/84	93	VERDICT in favor of defendant Norcia and against plaintiff Willie Harris on his loss of consortium claim and award no damages filed.
9/12/84	94	VERDICT in favor of defendant Kuehner and against plaintiff Willie Harris on his loss of consortium claim and award no damages filed.
9/12/84	95	VERDICT in favor of defendant Daianu and against plaintiff Willie Harris on his loss of consortium claim and award no damages filed.
9/12/84	96	INTERROGATORIES (1-15) to jury filed.

DATE	NR.	PROCEEDINGS
9/14/84	97	JUDGMENT entry that plaintiff Geraldine Harris recover the sum of $200,000.00 plus reasonable attorney fees and costs; FURTHER, that all other claims of plaintiff Geraldine Harris against all defendants are hereby dismissed, with prejudice; FURTHER, that all claims of the remaining plaintiffs against all defendants are hereby dismissed, with prejudice filed. Bell, J. Copies mailed 9/18/84.
9/20/84	98	MOTION of defendant City of Canton for judgment notwithstanding verdict and alternative motion for new trial by defendant City of Canton filed. Copies mailed 9/19/84.
9/20/84	99	MOTION of defendant City of Canton for stay of execution filed. Copies mailed 9/19/84.
9/21/84	100	MARSHAL'S RETURNED re motion to show cause and order (2) returned and filed. Personal service for both 9/5/84 on Ronald L. Inman and Walter Cherry. FEES: $13.20.
10/2/84	101	MOTION of plaintiff to strike defendant's motion for judgment notwithstanding verdict and alternative motion for new trial filed. Copies mailed 10/2/84.
10/2/84	102	OBJECTION of plaintiff to defendant's motion of stay of execution with brief In support filed. Copies mailed 10/2/84.
10/2/84	103	RESPONSE Of plaintiffs to defendants' motion for judgment notwithstanding verdict, and alternative motion for new trial with brief in support filed. Copies mailed 10/2/84.

DATE	NR.	PROCEEDINGS
10/3/84	104	PROOF of Service of plaintiff filed. Copies mailed to Mark M. Behnke, plaintiff's Objections to defendants' motion to Stay execution; response to defendants' motion for judgment notwithstanding verdict and alternative motion for new trial and motion to strike defendant's motion for judgment notwithstanding verdict and alternative motion for new trial.
3/14/85	105	ORDER that a hearing shall be held 3/27/85 at 8:30 a.m.; FURTHER, counsel for City is directed to be prepared to go forward on the motion to stay execution of the judgment entered 9/14/84 pursuant to Rule 62 of the Federal Rules of Civil Procedure filed. Bell, J. Copies mailed 3/14/85.
3/14/85	106	ORDER that defendant City of Canton's motion for judgment notwithstanding the verdict and alternative motion for new trial are DENIED filed. Bell, J. Copies mailed 3/14/85. (NOTED: 3/14/85)
4/9/85	107	ORDER that judgment against City of Canton is suspended pending appeal and that City provide supersedeas bond in amt. of $1,000 filed. Bell, J. cm/n 4/11/85)
4/11/85	108	NOTICE of Appeal of defendant/appellant filed. No service indicated. Copies of Notice mailed to USCA for the Sixth Circuit, Steven M. Fitten, Thomas P. Albu and William J. Hamann, and William C.H. Ramage 4/17/85. No fees paid. (4/18/85, $70.00 fee paid, receipt #121392.)

DATE	NR.	PROCEEDINGS
4/11/85	109	SUPERSEDEAS (Restitution) Bond filed.
4/23/85	110	TRANSCRIPTS Order of defendant/appellee filed. Transcript of Jury Instructions requested.
4/29/85	111	ACKNOWLEDGMENT from the USCA for the Sixth Circuit of the Notice of Appeal filed. Received 4/22/85; filed 4/24/85. CASE NO. 85-3314.
5/22/85	112	MOTION of plaintiffs for extension of time to file cross-appeal filed. Copies mailed 5/22/85.
6/7/85	113	MOTION of defendants/appellants for extension of time to file cross-appeal CONTRA with memorandum in support filed. Copies mailed 6/6/85.
6/13/85	114	ORDER that plaintiffs' motion for extension of time to file a cross-appeal is denied filed. Bell, J. Copies mailed 6/14/85. (NOTED: 6/14/85)
6/17/85	115	TRANSCRIPT of proceedings before the Honorable Sam H. Bell commencing 8/31/84 filed. Kraemer, R.
6/17/85	116	TRANSCRIPT of proceedings before the Honorable Sam H. Bell commencing 9/5/84 filed. Kraemer, R.
6/18/85	117	TRANSCRIPT of proceedings before the Honorable Sam H. Bell and Jury 8/28/84 at 1:30 p.m. filed. Pallo-Salopek, R.
6/18/85	118	TRANSCRIPT of proceedings before the Honorable Sam H. Bell and Jury 8/29/85 at 1:30 p.m. filed. Pallo-Salopek, R.
6/27/85		CERTIFIED Original Pleadings mailed to USCA for the Sixth Circuit 6/27/85.

DATE	NR.	PROCEEDINGS
**8/30/84	119	AMENDED Complaint with JURY DEMAND filed. Copies mailed 6/29/84.
8/30/84	120	SUPPLEMENTAL Proposed Jury Instructions of plaintiffs filed. Copies mailed 8/30/85.
***		
9/11/84	121	TRANSCRIPT of Testimony of Thomas A. Rollo before the Honorable Sam H. Bell and jury commencing 8/28/84 at 1:15 p.m. filed. Pallo-Salopek, R.
7/17/85	122	ACKNOWLEDMENT from the USCA for the Sixth Circuit of receipt of certified original pleadings filed. Received 6/28/85; filed 7/10/85.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C 80-18A

HONORABLE JOHN M. MANOS

GERALDINE HARRIS
WILLIE G. HARRIS
BERNADETTE HARRIS
1817 Penn Place, N.E.
Canton, Ohio 44704,

Plaintiffs

-vs-

CITY OF CANTON, OHIO
STANLEY CMICH, MAYOR
City Hall
Canton, Ohio 44702

STANLEY CMICH
individually and in his official
capacity as Mayor
City of Canton
City Hall
Canton, Ohio 44702

FRANK J. BURNOSKY
individually and in his official
capacity as
Director of Public Safety
City of Canton
City Hall
Canton, Ohio 44702

CANTON POLICE DEPARTMENT
PAUL HIGGINS, Acting Chief of Police
City Hall
Canton, Ohio

DAVID MASER
individually and in his official
capacity as Chief of Police
Canton Police Department
City Hall
Canton, Ohio 44702

PATROLMAN JAMES R. SCHNABEL
PATROLMAN RAYMOND SAMOLIA
PATROLMAN MATT NORCIA
PATROLMAN JOHN DAIANU
PATROLMAN ROBERT KUEHNER
individually and in their official
capacity as members of the
Canton Police Department
City Hall
Canton, Ohio 44702,

Defendants

AMENDED COMPLAINT:
CIVIL RIGHTS; JURY DEMAND

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1341 and 1343; the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. Sections 1981, 1983, 1985 and 1986 in that Plaintiffs seek redress for the deprivation, under color and authority of State law, of rights, privileges and immunities secured by the U.S.

Constitution and laws of Congress. The amount in controversy exceeds $10,000.00, exclusive of interest and costs. All other claims are cognizable by this Court pursuant to the doctrine of pendent jurisdiction.

2. All of the act alleged herein occurred within the Northern District of Ohio and in the municipality of Canton, Ohio.

PARTIES

3. During all times mentioned in this Complaint, Plaintiffs Willie G., Geraldine and Bernadette Harris were and still are citizens of the United States and residents of the State of Ohio, County of Stark, and residing at 1817 Penn Place, N.E., Canton, Ohio.

4. Defendant, The City of Canton, is an Ohio municipal corporation, and during all times mentioned herein had, as its elected and appointed officials, agents and employees, Defendants: Stanley Cmich, David Maser, Frank J. Burnosky, James R. Schnabel, Raymond Samolia, Matt Norcia, John Daianu and Robert Kuehner, which Defendants are being sued individually and in their official capacity.

5. Defendant, Stanley Cmich, is the duly elected Mayor of the City of Canton, and as such has responsibility for the proper administration of all the affairs of the City of Canton, for the supervision and direction of all employees, appointed officials and agents of the City of Canton, for the proper enforcement of all of the laws and ordinances of the City of Canton, and to insure that the Constitution, laws and statutes of the State of Ohio and the United States of America are properly obeyed, implemented and upheld by the appointed officials, agents, servants and employees of the City of Canton.

6. Defendant, David Maser, was the duly appointed Chief of Police since at least January 1, 19— until May 23, 1980, and as such was responsible for the management, control, and supervision of the Canton Police De-

partment in the preservation of the peace and dignity of the City of Canton, for the protection of persons and property, and enforcement of all laws and ordinances of the City of Canton, and the Constitution, statutes, and laws of the State of Ohio and United States of America.

7. Defendant, Frank J. Burnosky, is the duly elected Public Safety Director of the City of Canton, and as such has responsibility for the issuance, administration, and enforcement of the operations, rules and regulations of the Canton, Ohio Police Department and the Statutes of the State of Ohio and Ordinances of the City of Canton for the government, discipline, administration and operation of the Canton Police Department.

8. Defendants, Stanley Cmich, David Maser and Frank J. Burnosky as duly elected and appointed officials of the City of Canton, Ohio, have the power and authority to promulgate and/or to direct to be promulgated, such orders, rules, guidelines, regulations, directives, and Codes deemed necessary to maintain discipline and insure reasonable, prudent and proper conduct of the officers and members of the police force of the City of Canton.

9. Defendants, James R. Schnabel, Raymond Samolia, Matt Norcia, James Daianu and Robert Kuehner, are patrolmen employed by the Police Department of the City of Canton, and, as such, are under a duty to, at all times, protect life and property and to preserve the public peace and obey the laws and ordinances of the City of Canton, and the Constitution, laws, and statutes of the State of Ohio and the United States of America.

10. Defendant, Canton Police Department is a departmental agency of the City of Canton, Ohio, and is responsible for the preservation of the peace and dignity of the City of Canton, for the protection of persons and property and enforcement of all laws and ordinances of the City of Canton, and the constitution, statutes, and laws of the State of Ohio and United States of America.

11. Each and all of the acts of defendants alleged herein were done by defendants under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of Ohio, the City of Canton, and the County of Stark, and under the authority of their office for such city and county.

STATEMENT OF CLAIM

12. On April 26, 1978 at approximately 7:55 a.m., plaintiff, Geraldine Harris, accompanied by her daughter Bernadette, was lawfully operating her automobile in the City of Canton, County of Stark, State of Ohio, along Park Drive, N.W., heading towards McKinley High School. Shortly thereafter Defendant James R. Schnabel signaled Mrs. Harris to stop her vehicle, which she did, and was cited for speeding. Schnabel was then operating an automotive police patrol vehicle owned and maintained by the City of Canton for the use and benefit of its police department.

13. At defendant's request, plaintiff displayed her valid Ohio driver's license, whereupon defendant, without any warrant or probable cause therefor, arrested and ordered plaintiff to get out of her car and go to the police cruiser. Schnabel then verbally assaulted and abused Mrs. Harris with the intent and purpose of humiliating and embarrasing plaintiff in the presence of the public generally, and particularly the people present at the scene.

14. Bernadette Harris pleaded with Schnabel to issue a citation. Subsequently, he made a call on the police radio, faced Bernadette, reached for his gun and put his hand on the pistol grips.

15. Another patrol car and paddy wagon, driven by Canton Policemen Raymond Samolia and Matt Norcia, respectively, arrived on the scene, conferred and conspired with Schnabel, and in concert, pulled, shoved, cuffed and assaulted Geraldine and struck Bernadette Harris, several

times, causing them to sustain physical pain and injury, humiliation, and suffer grave emotional shock and distress. Bernadette and Geraldine Harris received medical treatment for their injuries.

16. At the Canton, Ohio Police Department Jail, Mrs. Harris was disrobed, searched and subjected to manual indignities by Canton Policemen Daianu, Samolia, Norcia and Kuehner. Throughout her custody and incarceration, Mrs. Harris was taunted by Police and grew increasingly ill and required immediate medical treatment. Defendant Policemen refused to provide medical assistance and to advise Mrs. Harris of her rights, including the right to an attorney, telephone calls, bail and visitation. Mrs. Harris was detained from approximately 8:00 a.m. until 9:00 a.m. by defendants on April 26, 1978.

17. Defendants forced Mrs. Harris to abandon her vehicle, which was later towed away and impounded even though Bernadette was duly licensed and begged the police to operate the car. Mrs. Harris was booked on "open charges" and compelled to submit to fingerprinting by Kuehner and Norcia under the supervision Daianu and Canton Police Captain Alan Maxon and Police Chief David Maser.

18. No felony or misdemeanor charges were ever preferred against Mrs. Harris in connection with or in support of the arrest, search, seizure, and imprisonment to which plaintiff was subjected as set forth herein. Mrs. Harris was never brought before a magistrate, notified of the criminal charges of which she was being held, and ignored when she inquired as to the aforementioned.

19. By reason of the injuries resulting to Geraldine and Bernadette Harris, expert medical treatment and hospital care was required for both parties. Plaintiffs incurred hospital expenses in excess of $1,500.00. Mrs. Harris has and will continue to incur necessary and rea-

sonable physician expenses for physical and psychological treatment by reason of such injury.

20. Plaintiffs incurred attorneys fees and expenses in connection with the arrest and inpoundment of their car.

21. As a result of the injuries to his wife and daughter, Plaintiff Willie G. Harris, has been deprived of their services as they were and are not able to perform their duties in the home in the same manner prior to the incident.

22. Further, as a result of Defendants action, Plaintiff Willie G. Harris, has been deprived of his wife's and daughter's society, companionship, affection and assistance.

23. During all times mentioned herein, Defendants, acting separately and in concert and under color and authority of State law, subjected and caused to be subjected Plaintiffs to the deprivation of rights and secured by the Constitution of the State of Ohio and the United States of America, to wit: the right to life and liberty, the right against unlawful searches and seizures, the right to freedom from assault and infliction of bodily injury; and the right to due process of law, when, on April 26, 1978, Plaintiff Geraldine Harris was arrested and imprisoned and Plaintiffs Geraldine and Bernadette Harris was Physically assaulted.

24. Defendants, in the period in question, committed certain acts which effected the deprivation alleged in paragraph 23 above. The acts include, among others, the following:

(a) The Defendant, City of Canton, by and through its elected officers, agents, appointed officials and employees, acting in concert, hired and placed on the streets of Canton, Ohio, on the days prior to and including April 26, 1978, improperly and insufficiently trained police officers with loaded guns, and other weapons, who were permitted

to use the power of arrest and to inflict serious physical injury upon the citizens of the City of Canton without justification, and who, negligently, intentionally, recklessly, willfully, wantonly and without justification, deprived Plaintiffs of life, liberty, due process and inflicted cruel and unusual punishment and serious physical injury and suffering.

(b) The Defendant, Stanley Cmich, the duly elected May (sic) and chief administrator and executive officer of Canton, Ohio and Frank J. Burnosky, Safety Director, on the days prior to and including April 26, 1978, negligently, intentionally, willfully, and wantonly hired and ordered on the streets of the City of Canton, police officers who utilized their status as police officers to perpetuate and conceal their deprivation of life and liberty and to conduct an unlawful arrest, search, seizure and detainment, and to inflict punishment and injury without justification and due process of law.

(c) The Defendant, David Maser, Canton, Ohio Chief of Police, on the days prior to and including April 26, 1978, as the Chief executive officer of the department, and while acting in concert with all defendants named herein, hired, ordered and placed upon the streets of the City of Canton, Ohio, police officers improperly and insufficiently trained as police officers, and who, displaying a lack of judgment, used their status as police officers under the direction of defendant, David Maser, Chief of Police, to perpetuate and conceal the deprivation of life and liberty and to conduct an unlawful arrest, search, seizure and detainment, and to inflict punishment and injury without justification and due process of law.

(d) Defendants, Stanley Cmich, Frank J. Burnosky and David Maser, as duly elected and appointed officials, and employees of the City of Canton have promulgated or directed to be promulgated, certain General Police Orders, Rules of Conduct and other guidelines which fail clearly, adequately and specifically delineate policies regulating

arrest procedures and the use of force in conjunction therewith by Canton Police Officers while acting within the scope of their authority as employees, and members of the Police Department of Canton, Ohio.

(e) The Defendants, Patrolmen James R. Schnabel, Raymond Samolia, Mike Norcia, John Daianu and Robert Kuhner, Canton Police Officers, acting within the scope of their employment as police officers, and acting in concert with all Defendants named herein, conspired and unlawfully arrested Plaintiff Geraldine Harris and assaulted Plaintiffs Geraldine and Bernadette Harris, utilizing their status as police officers to perpetuate and conceal their deprivation of life and liberty and to inflict injury and punishment without justification and due process of law.

25. As a result of Defendants' conduct, Plaintiffs and other citizens of the City of Canton have been and may be denied certain rights secured to all citizens by the Constitution of the State of Ohio and the United States to wit:

(a) The right to due process of law;

(b) The right to equal protection of the law;

(c) Freedom from harassment and intimidation by police officers;

(d) Freedom from coercion and intimidation;

(e) Freedom from unnecessary force when arrested;

(f) Freedom from bodily injury and assault; and

(g) Freedom from unlawful searches and seizures.

Plaintiff states that Defendants intentionally engaged in malicious, willful and wanton misconduct and recklessly caused Plaintiffs to be unlawfully arrested and assaulted and their automobile absconded.

26. Plaintiffs state that at the time the above Defendants arrested and assaulted Plaintiffs, neither Geraldine

or Bernadette Harris were violating any law nor were they contributorily negligent. Defendants were and are under a legal duty to protect Plaintiffs and breached this duty.

27. Plaintiff states that Defendants actions as described herein also deprived Plaintiffs of their Civil Rights and were motivated and intended because of Plaintiffs race (Black).

28. Defendant David Maser, as Canton, Ohio Chief of Police, has during his term in said position and on April 26, 1978 failed to manage, train, supervise, and review and discipline members of the police force resulting in an official policy or custom which authorized and acquiesced in the deprivation of plaintiffs' rights and in the reckless disregard of constitutional safeguards and public safety. Maser's failure in this regard has directly contributed to lawlessness and disorganization within the police department.

29. Defendant Frank J. Burnosky, during his term as Safety Director and on April 26, 1978, has failed to initiate investigations of police misconduct and complaints of violations of civil rights, unlawful arrests and seizures brutality, and assure that members of the Canton police force have adequate training, working knowledge, and continuing education in the rules, regulations, law, and judicial decisions governing criminal procedure arrests, and the use of force. Burnosky has failed to periodically evaluate, update, and define the rules, and regulations of the Canton Police Department.

30. Defendant Stanley Cmich, as Mayor, has at all times authorized by official policy, statements, directives, and orders, unlawful arrest procedures and other police action, and refused to monitor and command the Public Safety Director to investigate incidents and complaints of police misconduct and to review on a continuing basis supervision, training, and the administration of the Canton Police force.

31. Defendant David Maser was present and had knowledge of the events surrounding Mrs. Harris' arrest on April 26, 1978 yet did nothing to secure her release and suppressed and prevented any action taken against the policemen involved.

32. Defendants Cmich and Burnosky and Maser collectively condoned the arrest, incarceration, and brutalization of Bernadette and Geraldine Harris and exhibited deliberate and conscious indifference to her plight, the affairs of the Canton Police Department, and public safety as a whole.

COUNT I

33. Plaintiffs incorporates by reference paragraphs 1-32 above as if fully rewritten herein.

34. This Count arises under state claims and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution which provide the right of all persons to be secure in their persons and property and proscribe unlawful arrests and arrest procedures, and seizure of property.

Defendant's act and conduct as alleged herein violate the Fourth, Fifth and Fourteenth Amendments and have deprived Plaintiffs of life, liberty, due process and caused them to suffer bodily injury, stress and trauma.

COUNT II

35. Plaintiffs incorporate by reference paragraphs 1-35 above as if fully rewritten herein.

36. This Count arises under the Eighth and Fourteenth Amendments to the United States Constitution which provide that cruel and unusual punishment shall not be inflicted nor a person punished for crimes of status or where an arrest is unnecessary and bodily injury, assaults and severe penalties or conditions are imposed or occasioned thereby.

37. Defendants acts and conduct as alleged herein violate the Eighth and Fourteenth Amendments to the United States Constitution, causing Plaintiff Geraldine Harris to endure unlawful imprisonment and confinement, searches and physical assaults and abuse.

COUNT III

38. Plaintiffs incorporate by reference the allegations of Paragraphs 1-37 as if fully rewritten herein.

39. This Count arises under the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1981 which provides that all persons within the jurisdiction of the United States shall have the same right in every state to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like penalties and punishment.

40. Defendants acts and conduct as alleged herein deprived Plaintiffs of equal benefits of the law and were made to suffer under hardship, injury and punishment because of their race.

COUNT IV

41. Plaintiffs incorporate by reference the allegations of Paragraphs 1-40 as if fully rewritten herein.

42. This Count arises under the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983 which protects against the deprivation of rights, privileges or immunities by persons or agencies acting under color of State law or authority.

43. Defendants' acts and conduct as alleged herein deprived Plaintiffs of life and liberty and made them suffer hardship, injury and punishment unlawfully also because of their race.

COUNT V

44. Plaintiffs incorporate by reference the allegations of Paragraphs 1-43 as if fully rewritten herein.

45. This Count arises under 42 U.S.C. Section 1985 which protects against the deprival of civil rights of any person or class of persons by two or more persons acting in concert.

46. Defendants, acting in concert, deprived Plaintiffs of their civil rights as described herein and caused them to suffer injury and loss of freedom, by and through the use of force, intimidation, threats and unlawful restraint.

COUNT VI

47. Plaintiffs incorporate by reference the allegations of Paragraphs 1-46 as if fully rewritten herein.

48. This count arises under 42 U.S.C. Section 1986 which protects against conspiratoral action by every person who, having knowledge that any wrongs conspired to be done, does nothing or neglects to prevent such action.

49. Defendants intentionally, collectively and in concert deprived Plaintiffs of their Civil Rights and caused them to suffer injury and damages.

RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. Judgment against Defendants, Canton, Ohio, Stanley Cmich, Frank J. Burnosky, David Maser, James R. Schnabel, Raymond Samolia, Matt Norcia, John Daianu and Robert Kuehner, jointly and severally in the amount of One Million Dollars ($1,000,000.00) as compensatory damages.
2. Judgement against defendants, Canton, Ohio, Stanley Cmich, David Maser, James R. Schnabel,

Raymond Samolia, Mike Norcia, John Daianu and Robert Kuehner, Canton Police Department and Frank J. Burnosky, in the amount of Two Million Dollars ($2,000,000.00) as exemplary damages.

3. Award Plaintiffs the costs and expenses incurred in this action at the rate of six percent (6%) plus reasonable attorneys fees.
4. An order from this Court enjoining Defendants from promulgating, encouraging, approving, and/or allowing practices, procedures and guidelines regulating arrest and use of force by police officers which violate the Constitutional rights of the citizens of Canton, Ohio.
5. An order from this Court requiring Defendants to begin forthwith to develop specific, adequate and clear guidelines in accordance with all rights secured and guaranteed by the Constitution of the State of Ohio and the United States of America, regulating arrests and use of force by police for the immediate implementation by the Canton Police Department.
6. Pursuant to this Court's inherent equitable powers and 42 U.S.C. Section 1988, grant such other relief as is appropriate in this action.
7. Declare that the practices, policies, customs, and conduct of Defendants are unconstitutional, as complained of herein.

/s/ Steven M. Fitten
STEVEN M. FITTEN
Attorney for Plaintiffs
Courts Tower Building
41 N. Perry Street, Suite 300
Dayton, Ohio 45402
(513) 228-5126

(Certificate of Service Omitted in Printing)

EXHIBIT A

333.24 He shall inspect his vehicle prior to using same, making sure all necessary equipment is available. Replacing and replenishing necessary equipment and notifying his supervisor of these facts.

334 JAILER

A Patrol Officer assigned as a Jailer shall be responsible through intermediate superiors to the Commanding Officer of the Patrol Shift to which he is assigned for the efficient operation of his assignment in conformance with established procedures and policies.

334.1 He shall, upon assuming supervision of the jail cell block, either because of shift change or by special assignment, immediately determine the number of prisoners confined in the jail, classifying them as felons, misdemeanors, male or female, satisfying himself that there is a special file card for each prisoner and report such findings to his supervisor.

334.2 He shall, after booking a prisoner, cause him or her to be searched thoroughly before committing him or her to a cell. He shall enter the name, together with other relative information on prescribed forms assuring that such forms are complete and properly filed.

334.3 He shall under no circumstances enter the cell block at any time, except in extreme emergency, unless other police officers are present. At no time shall he enter the cell

block while armed unless circumstances so warrant.

334.4 He shall be held strictly responsible for monies received, property taken from prisoners, either as evidence of crime or for safekeeping and for any other valuables or property trusted to him by virtue of his official position.

334.5 He shall keep a record as prescribed for all services rendered to the prisoner, including telephone calls, names of visitors, medical care, when transferred and where, and any other services rendered, listing the data and time of said services.

334.6 He shall, when handling and processing a violent mental or suspected mentally ill prisoner, be governed by the Ohio Revised Code Section 5122.10 of which states that such persons may be taken into custody and transferred to a mental hospital. He shall complete the prescribed forms in compliance with department procedure and have such person transferred to said hospital.

334.7 He shall, when a prisoner is found to be unconscious or semi-unconscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to City Jail.

334.8 He shall make inspections of the entire jail block area, determining the cleanliness and operative condition of the jail, including all equipment, particularly the breathalyzer,

implements, utensils and other assigned jail and kitchen equipment, noting the deficiencies and irregularities found to be existing, reporting his findings to his supervisor.

334.9 He shall be responsible for providing food for the prisoners as prescribed in accordance with department procedure. He shall maintain an inventory of all food supplies and furnish the Day Shift Jailer with a daily list of needed food. It shall be the responsibility of the Day Shift Jailer to see that such foods are made available.

334.10 He shall never permit the jail keys to leave his person, always transferring the keys to his relief at shift change or other persons authorized to receive the keys by person to person exchange. He shall see to it that jail keys are never permitted to lie on a desk, table, floor or other place.

334.11 He shall call upon the Wagon Driver to assist him in any and all duties pertaining to the jailer's duties if and when such assistance may be needed or required and it shall be the duty of the Wagon Driver to render such assistance.

334.12 He shall be responsible for administering the breathalyzer examination to those prisoners that have been charged with driving while under the influence of intoxicants and shall complete the necessary forms as prescribed by department procedure and policy.

334.13 He shall be governed by the general rules and regulations of the department and the rules and regulations adopted for Patrol

Officers, in so far as they do not relate to specific uniformed assignments.

335 WAGON DRIVER

A Patrol Officer assigned as a Wagon Driver shall be responsible through intermediate supervisors to the Commanding Officer of the shift to which he is assigned for the efficient operation of his assignment in conformance with established procedures and policies.

PETITIONER'S

BRIEF

No. 86-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF PETITIONER

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251

Counsel for Petitioner

* Counsel of Record

May 5, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the City of Canton can be held liable under 42 U.S.C. § 1983 on the ground that a City employee was delegated authority to act in a manner not in violation of the Constitution if the City failed to prove that the employee had been given adequate training to exercise that authority.

2. Whether the City of Canton can be held liable under 42 U.S.C. § 1983 for the alleged failure of an employee of the City to provide medical treatment to a single jailed detainee.

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TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1987

No. 86-1088

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying Defendant's Motion for Judgment Notwithstanding the Verdict or for a New Trial (Pet. App. 12a-18a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on July 2, 1986, and a petition for rehearing was denied on August 22, 1986. On November 4, 1986, Justice Scalia extended the time for filing a petition to and including

January 4, 1987. The petition for a writ of certiorari was filed on January 2, 1987. The petition was granted on March 7, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend XIV, § 1) provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Section 1983 (42 U.S.C. § 1983) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

STATEMENT

1. Respondent Geraldine Harris was lawfully arrested on April 26, 1978, by officers of the Canton Police Department who transported her to the City's Police Station in a patrol wagon. Pet. App. 2a. When she arrived at the station, Mrs. Harris was found sitting on the floor of the wagon. *Id.* A police captain, who was present when the patrol wagon arrived, asked Mrs. Harris if she was in need of medical attention. *Id.*; see Tr. 2-82, 4-327—4-329 (testimony of shift supervisor, Captain Maxson). Mrs. Harris did not indicate that she needed any assistance; instead she repeatedly asked to see "Ronnie," her son. Pet. App. 2a. Police officers immediately contacted Mrs. Harris' son and asked him to come and arrange for his mother's release into his custody.

After being brought into the police station, Mrs. Harris, who was leaning against the wall, slumped to a seated position on the floor. Pet. App. 2a.[1] Officers twice assisted Mrs. Harris to her feet and placed her in a chair, but she slumped back to the floor. *Id.* Mrs. Harris was fully conscious and aware of her actions during the time that she was in custody. See *e.g.*, Tr. 4-333 (testimony of Captain Maxson); Tr. 3-232 (testimony of Officer Norcia). Police officers who were present testified that they did not believe that Mrs. Harris was sick or injured; rather, they believed her actions to have been an emotional response to her arrest. Tr. 4-318—4-320; Tr. 3-237—3-238; see also Pet. App. 2a. Such reactions are not at all uncommon among arrestees. Pet. App. 2a; see Tr. 3-237—3-238 (testimony of Officer Norcia).

During the course of booking procedures, Mrs. Harris again was asked if she required medical attention or medication and she repeatedly responded that all she wanted was to see "Ronnie." Tr. 4-329, Tr. 2-80—2-82. After bond procedures were completed, Mrs. Harris was placed in a holding cell for a short period of time until she was released into the custody of her family. Pet. App. 2a-3a. Mrs. Harris had been held in police custody at the City Police Station for no more than 30 to 40 minutes. Pet. App. 3a.

2. Mrs. Harris, together with her husband and daughter ("Respondents"), subsequently brought this lawsuit under 42 U.S.C. § 1983 against various individual police officers involved in her arrest, city officials—including the mayor and police chief—and the City of Canton itself. Respondents alleged, *inter alia*, that the City had violated Mrs. Harris' due process rights by depriving

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[1] See also Tr. 3-247, 4-256 (testimony of Officer Kuehner); Tr. 4-315 (testimony of Captain Maxson).

her of medical treatment during the course of her post-arrest detention.[2]

With respect to the claim that Mrs. Harris had been denied reasonable access to medical treatment because of a City custom or policy, the evidence at trial established that the patrol officer assigned as "jailer," in consultation with a supervising officer, is responsible for determining whether persons in police custody require immediate medical attention. The regulations of the Canton Police Department specifically provide that:

> [the officer assigned as jailer] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

Pet. App. 4a; see City of Canton Police Regulation 334.7 (J.A. 34). The evidence at trial established that the regulation was applied as written and that the normal procedure was for the jailer to determine, in consultation with a supervising officer, whether a prisoner was in need of medical attention. See Tr. 4-347—4-349 (testimony of Police Chief Maser); Tr. 2-159—2-160 (testimony of Officer Wyatt). The jailers and supervising officers did not receive specialized medical training beyond basic first aid. The regulation plainly assumes that

[2] Respondents' complaint included a number of claims that were rejected by the district court or the jury, including constitutional claims under the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments, as well as common law claims for false imprisonment, assault and battery.

The court granted the motions for directed verdict by Mayor Stanley A. Cmich and Police Chief David Maser. J.A. 6. The jury found in favor of all of the remaining individual defendants, police officers Schnabel, Norcia, Kuehner, Daianu and Samolia, on all of the counts against them. J.A. 11-13. Respondents did not cross-appeal from these adverse judgments.

the officers would make any decision concerning whether a prisoner required hospitalization on the basis of common sense and experience. In this case, common sense and experience indicated to the police officers that Mrs. Harris did not require immediate hospitalization. Pet. App. 2a-3a; see Tr. 4-319—4-320; Tr. 3-237—3-238.

The case was tried to a jury, which rejected all of respondents' claims except the claim that the City unconstitutionally denied Mrs. Harris medical treatment during her post-arrest detention. On that claim, the jury awarded Mrs. Harris $200,000 *against the City*. The City's motions for remittitur, new trial or judgment notwithstanding the verdict were denied. Pet. App. 4a.

3. The court of appeals unanimously reversed the judgment of the district court, holding that one of the two alternative theories of municipal liability that had been presented to the jury was erroneous. The first instruction predicated the City's liability on the mere participation of "supervisory personnel" in the alleged constitutional violation. The court unanimously held that such an instruction was erroneous because supervisors are not policymakers for purposes of holding the City liable under Section 1983.[3] The inclusion of this theory as an alternative basis for imposing liability required that the jury's verdict be reversed on that ground. Pet. App. 9a.

The majority of the court of appeals voted to remand the case for a new trial on an alternative theory of municipal liability based on the premise that the City had a policy of inadequately training police officers. The court held that the City could be found liable on the theory that it had "an established policy of allowing shift commanders unfettered discretion . . . to make the decision

[3] Any doubt about the validity of that legal conclusion was swept aside earlier this Term in *City of St. Louis* v. *Praprotnik*, 108 S.Ct. 915, 927 (1988), in which the Court held that supervisors were not policymakers for purposes of municipal liability under Section 1983.

to refer a prisoner to the hospital . . . coupled with the fact that these commanders were given no training or guidelines for making this decision." Pet. App. 6a.[4] The court of appeals reasoned that inadequate training of police officers constitutes a municipal policy which, if it can be linked causally to a constitutional deprivation, is a sufficient basis for imposing liability on a city. As applied, the court held that the grant of discretion to the jailer to evaluate Mrs. Harris' medical condition coupled with the City's failure to "show any evidence of adequate training . . . raised a valid . . . issue of municipal liability . . . ." Pet. App. 6a. Accordingly, the court remanded the case to the district court for a second trial on that theory.

Judge Merritt dissented from the remand order. Pet. App. 10a-11a. First, he noted that the City's policy regarding medical treatment of arrestees clearly was not unconstitutional. Second, he argued there was no evidentiary basis for finding that it was the custom or policy of the City to apply its regulation in a manner that deprived arrestees of their constitutional rights. Pet. App. 10a. In the absence of a showing of custom or policy, he rejected the majority's contention that "a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury . . . ." Pet. App. 10a. He noted that the majority's inadequate training theory, as applied in this case, would "erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail." Pet. App. 10a.

[4] The Court's reference to "shift commanders" is unexplained, but the police regulations delegate the decision at issue to the jailer, in consultation with "his supervisor." The jailer's "supervisor" could be any one of the police captains on duty, but a captain is not a shift commander and there is no suggestion in the record that this routine decision to seek medical treatment for an arrestee was ever made by any high ranking officer of the police department.

SUMMARY OF ARGUMENT

Muncipal liability may only be imposed under Section 1983 upon proof that municipal actions "subjected" a person to injury under the Constitution or other federal law. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). The inquiry under *Monell* is whether the government—and not merely a government agent or employee—is responsible for the harm. Thus, a Section 1983 plaintiff must prove that a deliberate municipal act—either a government policy or custom is the moving force of the plaintiff's injury.

I.

In this case, the only relevant municipal policy was the City of Canton's police regulation that required the police to provide all arrestees with necessary medical care. Nevertheless, the court of appeals engaged in a purely speculative search for something that could be characterized, in a talismanic fashion, as a municipal "policy." The court of appeals concluded that the City's delegation of authority to the jailer, to decide whether to provide a person in police custody with medical attention, coupled with the absence of any evidence of adequate "medical" training, established a muncipal policy for which the City could be held liable. Such a theory of liability is irreconcilable with the limits of Section 1983 liability, as enunciated by this Court in *Monell* and its progeny.

A. This Court should reaffirm the bright line standard embodied in *Monell* that restricts municipal liability under Section 1983 to injuries that directly result from the adoption of a policy that is itself unconstitutional. By adopting such a standard, the Court would ensure that municipal governments only are held responsible when their own acts—as opposed to the acts of their employ-

ces—violate the Constitution. Such a rule also would avoid the recurring problem, illustrated by this case, in which a Section 1983 claim against a municipality is allowed to go to the jury in the absence of any evidence that any municipal decision caused the injury in question.

Because of the nature of municipal policies, there should rarely, if ever, be a serious question whether a policy exists or what it provides. *City of St. Louis* v. *Praprotnik*, 108 S.Ct. 915, 923-924 (1988). By requiring a showing that the policy in question is unconstitutional, and not merely that its misapplication led to constitutional injury, this Court would establish a fixed guidepost that would clarify the scope of the "policy" requirement for lower courts and litigants.

Adoption of such a standard would eliminate claims, such as those in this case, that blur the line between custom and policy. It also would allow municipal governments a fair opportunity to define, with some certainty, their actual policy in important areas of governmental conduct without concern that the policy choice might be misinterpreted by a jury exercising the hindsight available after an injury has occurred.

Imposing the requirement that the challenged policy itself be unconstitutional would not be a departure from precedent. See, *e.g.*, *Monell*, 436 U.S. at 661; *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 470 (1986). Nor would it leave potential plaintiffs without remedies. In addition to existing tort and administrative remedies, plaintiffs would, of course, remain free to maintain their Section 1983 claims against those individuals who acted under color of state law to cause their injuries.

There is no allegation of any unconstitutional municipal policy in this case. Nor in light of the protective nature of the City's policy toward providing medical care to detainees could such a claim have been made. Accordingly, the complaint against the City must be dismissed.

B. Even if the policy in question does not need to be unconstitutional itself, a Section 1983 claim against a city must nevertheless establish at least that (1) the city has taken a discrete and identifiable action in adopting the putative policy; (2) the policy was "deliberately" adopted from among alternatives; and (3) the policy was the "moving force" behind the constitutional injury. The court of appeals' theory of inadequate training is wholly inconsistent with all three of these basic requirements of a policy that subjects a city to potential liability under Section 1983.

First, the theory of inadequate training fails to require that the plaintiff identify or produce evidence of any municipal "action." Instead, the inadequate training theory simply invites the jury to "infer" from an injury caused by a municipal employee that the City had a policy of inadequate training. Thus, the theory suffers from the same defect identified in *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985); it permits the jury to infer the existence of a policy in the absence of any evidence, thereby "permitting precisely the theory of strict respondeat superior liability rejected in *Monell*." *Id.* at 831 (Brennan, J., concurring).

Second, the theory of inadequate training also fails to meet the requirement of intentional or deliberate conduct. The term "policy" implies "a course of action consciously chosen from among various alternatives . . . ." *Tuttle*, 471 U.S. at 823. In the absence of such a "state of mind" requirement, it is virtually impossible for a city to rebut the unsupported assertion that it had a "passive" policy of failing to train or supervise. Indeed, that is precisely what occurred in this case because there was no evidence that the City deliberately chose to limit training for any reason, much less with the knowledge or expectation that such "inadequate" training might restrict the access of detainees to medical care.

Finally, a theory of inadequate training fails to ensure that the municipal policy is the "moving force" of the constitutional violation. A Section 1983 plaintiff must establish that the "unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 482 (1986) (emphasis in original). In the instant case, there has been no showing that training was a "but for" cause of respondents' alleged injuries. There clearly is no basis in the record for finding that any City policy regarding training was the "moving force" in the alleged violation.

II.

Although the court below apparently analyzed the case solely in terms of municipal policy, the jury instructions could be construed to permit the City to be held liable for "implicitly authorizing" a custom of providing inadequate medical care. There is, however, no evidence in the record to support a "custom" of inadequate medical care for detainees in the City of Canton. All of the evidence related solely to the care provided to Mrs. Harris, and that clearly cannot prove that any well settled practice existed, particularly one that is directly contrary to the express policy of the City to provide medical care to injured detainees.

ARGUMENT

Section 1983 imposes liability on any "person . . . who subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. In *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), this Court overruled its previous decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), and held that municipal governments are "persons" subject to liability under Section 1983. *Monell*, 436 U.S. at 690. Based upon a thorough review of the legislative history of the Civil Rights Act of 1871, the Court held, however, that Congress did not intend to subject municipal governments to liability on the basis of respondeat superior or vicarious liability. Instead, Section 1983 granted relief directly against a city only where municipal actions directly "subjected" a person to constitutional injury. 436 U.S. at 690-694.[8] The Court made it plain that it is

> when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694.

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[8] The Court's analysis in *Monell* rejecting respondeat superior is supported by the legislative history of Section 1983 which recognizes that Congress intended that the Act provide only a "remedy" and not create any new form of liability. See Cong. Globe, 42nd Cong., 1st Sess. 568 (1871) (Sen. Edmunds). A theory of municipal liability based on respondeat superior, rather than a city's own acts, would have established vicarious constitutional liability, which was not recognized as a basis for recovery against cities in 1871. See *Monell*, 436 U.S. at 690-92; see also Cong. Globe, *supra* at 216 (Sen. Thurman) (Section 1983 authorizes plaintiff "to bring an action *against the wrong-doer* in the Federal courts . . . .") (emphasis added); see also *Monell*, 436 U.S. at 692 n.57 (describing Congress' rejection of respondeat superior liability in Sherman Amendment).

Thus, *Monell* teaches that municipal liability for constitutional injury under Section 1983 may be imposed only on the basis of (1) a municipal policy or (2) a municipal custom or practice. *Id.* In general, liability exists under the "policy" prong of *Monell* where the city's policymakers consciously adopt a final rule of general application which gives rise directly to constitutional injury. See *Pembaur*, 475 U.S. 480-81. Municipal liability under the "custom or practice" prong of *Monell* arises under less formal circumstances where a pattern or practice of unconstitutional acts by city representatives or employees places the city on notice of those acts and gives rise directly to the reasonable inference that the city has implicitly authorized the "custom" in question. See *Monell*, 436 U.S. at 690-91. The inadequate training theory employed by the court of appeals fails to establish a basis for liability under either prong of *Monell*.

I. The City Of Canton Cannot Be Held Liable Under Section 1983 For Adopting An Alleged "Policy" Of Providing Police Officers With Inadequate Medical Training.

The holding of the court of appeals in this case illustrates a disturbing trend in Section 1983 litigation in which courts and litigants, convinced that the term "policy" is a talismanic basis for municipal liability, search for anything that can be characterized as a "policy" in order to hold a city liable for a given injury. Thus, although respondents' only claim relates to a delay in the provision of medical care, the City's actual policy relating to the provision of medical care is rendered irrelevant. The fact that the City had an express, written policy to protect Mrs. Harris and to ensure that she received medical care (upon request or upon any reasonable indication of need) is treated by the respondents and the court of appeals as beside the point. But, to ignore the City's real policy and invite the jury to hold the City liable for

an amorphous failure to train, under a standard which effectively requires the policy to be implemented perfectly, exposes the City to liability for constitutional injuries in circumstances in which the City cannot fairly be held to account. This Court in *Monell* made clear that Congress expressly did not intend to impose liability in such circumstances where the City itself was not responsible for the injury.

Given that the lower courts have applied the "policy" standard for municipal liability in ways that cannot be reconciled with the limits of Section 1983, this Court should reaffirm the bright line standard embodied in *Monell* which restricts municipal liability under Section 1983 to injuries resulting from a "policy" *which is itself unconstitutional.*[6] By following this path first laid down in *Monell*, the Court would ensure that local governments are only held responsible when their own "acts" violate the Constitution. But, even if the Court declines ex-

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[6] As currently applied, the *Monell* standard has allowed the lower courts to affirm municipal liability in circumstances where it is virtually impossible to discern any "policy or custom," as those terms are usually understood. See, *e.g.*, *Rascon* v. *Hardiman*, 803 F.2d 269, 275 (7th Cir. 1986) (proof that county correctional facility lacked formal written disciplinary procedures, allowing individual officers to "conclude" that physical beatings are permissible, may result in county liability for actions pursuant to county policy); *Avery* v. *County of Burke*, 660 F.2d 111, 115 (4th Cir. 1981) (county may be liable for policy of failing to adopt policies, rules or regulations for counseling persons in county health facilities); *Anderson* v. *City of Atlanta*, 778 F.2d 678 (11th Cir. 1985) (where inmate injury traceable to inadequate staffing of facility, city may be liable for its policy of understaffing). Even a cursory review of Section 1983 cases suggests that the lower courts are struggling to fit cases within the "policy" mold when most typical misconduct claims either involve no real city policy or a policy that prohibits misconduct. See Brief of International City Management Association, *et al.*, as *Amici Curiae*, pp. 16-18 nn. 15-16, describing cases in which lower courts have affirmed finding of municipal liability based on fairly speculative theories of what constitutes municipal policy.

pressly to limit Section 1983 liability to unconstitutional policies, it still must hold that the Sixth Circuit's theory of liability for inadequate training is a grossly overbroad basis for holding cities liable, which conflicts with several decisions of this Court and which therefore must be rejected.

A. The City Cannot Be Held Liable Under Section 1983 On The Basis Of A Municipal Policy Unless The Policy Itself Is Unconstitutional.

Although this Court has withheld decision on the issue whether "a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can *ever* meet the 'policy' requirement of *Monell*," *Tuttle*, 471 U.S. at 824 n. 7 (emphasis added), it has expressed some doubt about the viability of such a theory. The Court's misgivings on that score are well founded. Given the principles limiting municipal liability under Section 1983, a requirement that the "policy" causing injury must be unconstitutional is an appropriate condition for imposing liability directly upon a city. Under such a requirement, the theory of the court of appeals must be rejected.

1. *Monell* and its progeny are, at bottom, about responsibility (*Pembaur*, 475 U.S. at 478), and they indicate that municipal responsibility for a constitutional violation can only be demonstrated when the city's actions are themselves unconstitutional. The term "policy" is not talismanic; rather, it is simply a "shorthand" expression used to determine whether a municipality—as opposed to a municipal employee or agent—"has caused [a person] to be subjected" to a violation of constitutional rights. The purpose of examining relevant municipal policy is to determine whether the constitutional injury in question results from city action or merely from individual action. Another way of framing the question is to ask whether the relevant city action is unconstitutional

or whether the unconstitutional act is more properly attributed to some other actor. It is only where the city's policy is unconstitutional that it can fairly be said that the city's own act has "caused [a person] to be subjected" to constitutional injury. See *Tuttle*, 471 U.S. at 828 (Brennan, J., concurring). Thus, the primary reason for requiring a finding that the policy in question was itself unconstitutional is that such a requirement serves the plain meaning of the statute and accurately reflects the element of municipal responsibility inherent in *Monell's* interpretation of Congress' intent in the Civil Rights Act of 1871.

In addition, imposing a requirement that the challenged policy itself must be unconstitutional is fully consistent with this Court's precedents. Indeed, in every case in which this Court has affirmed liability on the basis of a municipal policy, the policy in question was unconstitutional. In *Monell*, for example, the policy that compelled pregnant employees to take unpaid leaves of absence was found to be unconstitutional. 436 U.S. at 661-62. See *Tennessee* v. *Garner*, 471 U.S. 1 (1985) (statute which permitted the use of deadly force to effect the arrest of a fleeing suspect was unconstitutional insofar as it authorized the killing of an unarmed, nondangerous suspect); *City of Newport* v. *Fact Concerts*, 453 U.S. 247 (1981) (city council decision to cancel license found to violate First Amendment); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 470 (1986) (policy decision of county prosecutor regarding service of arrest warrants found to violate Fourth Amendment); *Owen* v. *City of Independence*, 445 U.S. 622, 663 (1980) (due process injury attributable to unconstitutional acts of city policymakers). Thus, a holding that the "policy" in quesiton must itself be unconstitutional would merely confirm what has been implicit in this Court's decisions to date.

Requiring a showing that the challenged policy is unconstitutional will protect important municipal preroga-

tives without impairing significantly the rights of plaintiffs. Because of the nature of municipal policies, liability under the "policy" prong of *Monell* (and the permissible range of appropriate municipal action) may be readily established under a rule that fixes liability for policy choices only in those situations where the policy is found to be unconstitutional. Such a rule would avoid the recurring problem, illustrated by this case, in which the Section 1983 plaintiff is permitted to argue in favor of City liability on the basis of a municipal "policy" in the absence of any evidence that any such policy actually exists.

Unlike questions of "custom," there should rarely, if ever, be a question whether a policy exists or what the policy provides. Municipal policies are often written and generally have fairly well-defined terms. This is so because municipal policy exists where there is a rule of general application that "establish[es] fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 480-81. Thus, by imposing liability under the "policy" prong of *Monell* only where it can be fairly said that the policy is unconstitutional, this Court could establish fixed guideposts that would clarify Section 1983 for lower courts and litigants. See *Praprotnik*, 108 S.Ct. 915, 924 (1988) (in Section 1983 municipal liability cases, court should attempt to clarify issue and avoid standard which leads to "uncertainty").

A bright line standard would eliminate claims, such as those in the instant case, that blur the lines between policy and custom and leave municipal governments unable to present an effective defense. Where the term "policy" is used loosely to include such matters as adequacy of training, the city is faced with the most difficult elements of both "custom" and "policy" claims. On the one hand, the city is held liable for a single incident —as is appropriate only in the case of claims based on municipal policy. See *Pembaur*, 475 U.S. at 482 n.11.

On the other hand, plaintiffs are allowed to rely on an amorphous, unwritten practice which the City is unable to prove does *not* exist—which is appropriate only in claims relying upon custom. See, *infra*, 31-35.

A bright line rule that limited Section 1983 liability to municipal policies that were in fact unconstitutional also would allow municipal governments a fair opportunity to confine municipal "conduct" to constitutional norms (and thereby avoid potentially crippling damage actions). Unlike other potential Section 1983 defendants, municipal governments lack a qualified immunity defense for actions taken in good faith. *Owen* v. *City of Independence*, 445 U.S. 622 (1980). Thus, cities, unlike other potential defendants, must make the *correct* choice in conforming each of their "actions" to the requirements of the Constitution. Although there will always be close questions, *cf. Pembaur*, 106 S.Ct. at 1295, a bright line test that requires the policy itself to be unconstitutional would provide city policymakers with some certainty that they could examine (and review) city policies to ensure that they are consistent with constitutional norms. At least, such a requirement would eliminate the current state of affairs in which every city policy is subject to constitutional "second-guessing" by a jury with the benefit of hindsight. In effect, a requirement that the challenged policy must be unconstitutional would allow city governments to operate in good faith (assuming appropriate knowledge of constitutional standards), while providing a remedy for those occasions when unconstitutional municipal conduct results in injury.

In addition, limiting the scope of municipal liability under the "policy" prong of *Monell* would not deprive Section 1983 plaintiffs of reasonable recoveries for injuries. Where there is no unconstitutional municipal policy, such plaintiffs would still be able to argue, in an appropriate case, that their injuries resulted from an action that "implements or executes" a municipal cus-

tom. Moreover, plaintiffs would retain their existing right to sue any individuals directly for constitutional injury caused by their actions under color of law. Injured plaintiffs also would have available state tort and administrative remedies. Thus, even if Section 1983 were intended, under an "insurance theory," to provide compensation in the absence of fault—and it clearly was not (*Monell*, 436 U.S. at 694-95)—a holding that municipal governments are only liable under Section 1983 for their unconstitutional policies would not leave potential plaintiffs without reasonable means to seek compensation. In sum, there is no basis in the language of Section 1983, its legislative history, this Court's decisions or sound public policy to open the door to expanded municipal liability by holding that municipal policies that are otherwise constitutional can nevertheless serve as the basis for holding a city liable for the acts of its employees in misapplying that policy.

2. If this Court determines that there is no municipal liability unless the policy in question is unconstitutional, then there is no basis for a new trial in this case. This is because there is no City policy at issue in this case which is even arguably unconstitutional.

City of Canton policy requires that when a prisoner requests or is in need of medical attention, the shift commander "*shall* . . . have such person taken to a hospital for medical treatment." J.A. 33 (emphasis added); see, *supra*, p. 4. Respondents ignore this clear statement of City policy, but the policy exists and it clearly is protective of the detainees' right to medical treatment. The policy is not unconstitutional. Neither is it unconstitutional to delegate authority to *implement* the policy. See *Praprotnik*, 108 S.Ct. at 927. In fact, the City has no other choice; either the policy of medical treatment is delegated to the employees who are physically present to implement the policy within the limits of the delegated discretion or it would not be implemented at all. To hold

otherwise would require every city to draft a medical treatment policy for its jails that defines every conceivable circumstance in which treatment might be necessary. But, as this Court has recognized, individual discretion cannot, as a practical matter, be legislated away. See *Praprotnik*, 108 S.Ct. at 925-26. More important, the Constitution does not require that every municipal government "codify" every policy in a way that eliminates employee discretion. Thus, neither the policy, nor the delegation of discretion to implement the policy, is unconstitutional in itself.

The only other arguable "policy" that the respondents (and the court below) can point to is the policy of providing only minimal formal medical training to the officers that make the decision whether a detainee is in need of medical treatment. Assuming arguendo that the level of training is indeed a policy—and it is not, see, *infra*, pp. 21-26—such a policy nevertheless is not unconstitutional. This is clear when the medical training issue is considered in context. First, under the police regulations, the jailer need only make the decision regarding necessity of treatment when the detainee cannot (or will not) request treatment. In such circumstances, the need for hospitalization is largely self-evident, especially to an experienced police officer. See, *supra*, pp. 4-5. Second, the jailer's decision to obtain medical treatment does not involve formal "medical" decision-making, but instead requires a common sense evaluation. That evaluation is not made in a vacuum. It is made by the jailer (an experienced officer), in consultation with a supervising officer, based on their collective experience and observation. In short, the level of training is appropriate to perform the task delegated to the jailer and his supervisor.[7] No one has suggested that the Constitution re-

[7] This is not to say that the jailer could never make a mistake and deny medical treatment in a situation in which a reasonable person could find that treatment was appropriate. But hiring of paramedi-

quires that every decision of every individual employee always be "correct," and imposing liability simply because the decision was incorrect involves adoption of respondeat superior liability. Unless the Constitution requires every prison and jail in the land to have "paramedical officers or medical specialists" (see Pet. App. 10a (Merritt, J., dissenting)) on the premises 24 hours per day, the level of "medical" training of police officers in the City of Canton is not, in itself, unconstitutional. Accordingly, the City cannot be held liable for the constitutional injuries cited by respondents which at most reflect an incorrect implementation of the City's constitutionally valid policies.

B. The City Cannot Be Held Liable Under Section 1983 Based On A Theory Of Inadequate Training In The Absence Of Proof Of A Municipal Policy.

The test for determining whether a particular action or decision represents municipal "policy" may focus on the nature of the decision (*i.e.*, whether the decision is one of *general application*) or it may focus on the identity or status of the decisionmaker (*i.e.*, whether the person is a *policymaker* and therefore acts on behalf of the municipality). See *Pembaur*, 475 U.S. at 481-84; *id.* at 499-501 (Powell, J., dissenting); see also *Tuttle*, 471 U.S. at 822. In either case, to prevail on a Section 1983 claim under the theory that a municipal policy caused the injury, a plaintiff must prove that: (1) the City has "acted" by adopting a policy; (2) the City "deliberately" adopted the policy from among various alternatives (*i.e.*, the City breached the appropriate standard of care), and (3) the policy was the "moving force" behind, rather

cal personnel would not ensure that the decision was made perfectly. At best, respondents can only argue that the jury could find that a higher level of training would have made it more likely that Mrs. Harris would have received earlier treatment. But that argument amounts to nothing more than a claim that the individual decision was incorrect, not that the policy was unconstitutional.

than the "but for" cause of, the constitutional injury.[8] The court of appeals' theory of inadequate training is wholly inconsistent with these basic requirements of a policy that subjects a city to potential liability under Section 1983.

1. At the outset, the theory of inadequate training fails to meet the most fundamental requirement of municipal liability under Section 1983 because it fails to *identify any municipal "act"* which would support a finding of municipal liability.[9] In effect, the inadequate training theory invites the jury to "infer" from an "inadequate" performance of one or more City employees

[8] It may be helpful, in defining the limits of liability for municipal "policies," to analogize to the familiar elements of tort liability. See, *e.g.*, *City of Springfield* v. *Kibbe*, 107 S.Ct. 1114, 1121 (1987) (O'Connor, J., dissenting). Generally, liability in tort requires a plaintiff to establish: (1) an act by the defendant; (2) the requisite standard of care (intent, negligence or strict liability); and (3) causation of the injury. See, *e.g.*, W. Prosser, The Law of Torts, 143 (4th ed. 1971). A Section 1983 claim that a municipal policy caused a constitutional tort similarly requires proof of all the same elements. See *Monell*, 436 U.S. at 690-91 (liability requires municipal act and causation of injury); *Tuttle*, 471 U.S. at 822-23 (plurality opinion) (noting that it is "open to question" whether negligence alone would support liability); see also *Kibbe*, 107 S.Ct. at 1121 (O'Connor, J., dissenting).

[9] The jury instruction, which the court of appeals approved, provided that the City would be liable if the City

> failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. . . . In other words, if you believe that the Canton Police Department adequately supervised, trained and controlled the police officers, then you shall return a verdict for the City of Canton . . . .

Tr. 4-389—4-390. Under these instructions there is *no requirement* that the City have *any policy* regarding training; rather, the jury need only find that the City failed to meet the undefined standard of "adequate" training and that the failure to meet such standard was based on the City's "gross negligence."

that the City, *sub silentio*, had a policy of inadequate training.[10]

In *Tuttle*, 471 U.S. at 808, this Court reversed a judgment against a municipality under Section 1983 where the instructions allowed the jury to " 'infer,' from a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the [city]." The Court found that inference to be "unwarranted" because it allowed the Section 1983 plaintiff to "establish municipal liability without submitting proof of a single action taken by a municipal policymaker." *Tuttle*, 471 U.S. 821. Such an inference of wrongful city conduct "would amount to permitting precisely the theory of strict respondeat superior liability rejected in *Monell*." *Tuttle*, 471 U.S. at 831 (Brennan, J., concurring). The inadequate training theory adopted by the court below suffers from precisely the same defect that caused this Court to reject the theory in *Tuttle*[11]—the "inference" of City "policy"

[10] The court of appeals did not explain how the City's written policy of providing necessary medical attention to arrestees affected the inadequate training theory.

[11] With respect to the sufficiency of the evidence under this theory, the court of appeals pointed to "two facts." First, the court noted (and it is undisputed) that the jailer had "discretion" in making medical treatment decisions. Second, the court stated that "the city could not show any evidence of adequate training." See Pet. App. 6a.

With respect to the first "fact," it is settled that the existence of discretionary authority is no proof of municipal policy. *Praprotnik*, 108 S.Ct. 927. With respect to the second "fact," the court erred in placing the burden of demonstrating the "adequacy" of training on the defendant/petitioner. By so shifting the burden, the court has established a rule in which a plaintiff proves his prima facie case of municipal liability merely by demonstrating that the employee was acting within the range of delegated authority, and it is then the city's burden to prove that training is "adequate." But, if there is one firm guidepost in this

is based upon a complete lack of evidence.[12]

In this case, the *only* evidence of any City policy was the written policy requiring that arrestees be provided necessary medical attention. Thus, as in *Tuttle*, 471 U.S. at 820-21, the court of appeals has sanctioned a theory which turns the *Monell* requirement of a municipal policy into a play on words in which real City policy is ignored and the "policy" of inadequately training police officers is employed as a contrivance to avoid the plain meaning of Section 1983 as interpreted by this Court in *Monell*. Section 1983 requires proof that the "person" to be held liable—the City—took some action that "cause[d] [respondent] to be subjected" to the constitutional violation. 42 U.S.C. § 1983. The City of Canton (by its policies) "caused" its employees to provide Mrs. Harris with medical assistance if she requested it or if they believed that she needed it. The most that respondents can prove is that the City's employees erred in applying that policy in a single instance. In no way can that support a holding that *the City* "acted" to injure Mrs. Harris.

In fact, the inadequate training theory espoused by the court below and the respondents does not even pur-

area of the law, it is that there is no municipal liability under a respondeat superior theory, which imposes liability on an employer simply on a showing that injury was caused by an employee acting within the scope of his delegated authority. By imposing liability in reliance on the City's "error" in so delegating authority, the court below demonstrates that its theory is distinguishable only in name from a claim of respondeat superior and therefore is clearly incorrect. See *Monell*, 436 U.S. at 693-94. But, in any case, even if respondents proved that petitioners did not "adequately" train police officers, such evidence would tend only to show the City's negligence and would not constitute evidence of a municipal policy.

[12] There is no evidence that any City "policymaker" ever adopted any policy of inadequate training for the Canton police. Nor was there any evidence of any rule of "general application" regarding the medical training received by police officers on duty at the jail.

port to identify any action on the part of the City that caused respondents injury. Instead, liability is premised on the delegation of "unfettered *discretion*" to the jailer "coupled with" the allegation that the City "has wholly failed to train or has been grossly negligent in training its police force . . . ." Pet. App. 5a-6a. But, such a shift in focus from City *policy* to the discretionary authority of City employees is antithetical to the "policy" requirement of *Monell*.

In *City of St. Louis* v. *Praprotnik*, 108 S.Ct. 915 (1988), this Court considered the issue of municipal liability based upon the presence of delegated authority. In that case, the respondent had argued that the City was liable to him for an unconstitutional retaliatory discharge on the ground that the City had delegated "final" authority—that was not subject to de novo review—to the supervisory officials who had discharged him.

This Court reversed. The Court reiterated that municipalities may be held liable under *Monell* only for acts for which the municipality actually is responsible, "that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 924 (quoting *Pembaur*, 475 U.S. at 480). Upon review of the record, the Court found no suggestion that the relevant city policymakers—the mayor, alderman and Civil Service Commission—had any *policy* authorizing retaliatory discharges. In fact, City policy, as reflected by the rules and decisions of the Civil Service Commission, was to the contrary. The Court then flatly rejected Praprotnik's argument that the delegation of final authority to apply the City's policy was in effect a delegation of policymaking authority. "Simply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy." *Id.* at 927. In fact, the Court noted that the City's practice of delegating discretion and "going along" with the employee's decision was consistent with a presumption that the "subordinates are faithfully

attempting to comply with the policies that are supposed to guide them." *Id.* Thus, the Court concluded that "the purposes of Section 1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy." *Id.*

As in *Praprotnik*, the mere fact that "discretionary" authority was delegated to the jailer does not make his conduct a reflection of City "policy."[13] A city only can "act" through its officials and employees. Because virtually all municipal authority must be delegated, the exercise of discretion by municipal employees is neither inappropriate nor unusual. As *Praprotnik* made clear, an exercise of discretionary authority cannot reflect city "policy" under Section 1983, unless another city policy causes that discretion to be exercised in a way that is unconstitutional. Thus, at bottom, the reliance on the City's grant of discretion (coupled with a vague deficiency in training) as the only evidence of a City "policy" demonstrates that respondents and the court below were unable to identify any action relating to the injury in this case that reasonably could be attributed to the City.

2. The inadequate training theory also fails to meet the "state of mind" requirement of intentional or deliberate conduct that is inherent in the term "policy." It is "difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training' unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the

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[13] The argument that the delegation was "coupled" with inadequate training is of no more help to respondents than was Proprotnik's allegation that the delegation was "coupled" with inadequate review. In both cases, the cities necessarily had delegated day-to-day decisionmaking authority to city employees. In both cases, there was no showing that the city policy of delegation was itself unconstitutional. In fact, in both cases, actual city policies (regarding civil service employees and the medical treatment of arrestees, respectively) clearly were constitutional.

policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. 823. This is so because "the word 'policy' generally implies a course of action consciously chosen from among various alternatives . . . ." *Id.*; see *Pembaur*, 475 U.S. at 480-81 & n.9; see also *id.* at 499-500 (Powell, J., dissenting).

This is not to say that a city may never be held liable for municipal actions that are undertaken recklessly or with deliberate indifference to their consequences. To the contrary, where there is more than a single incident of employee misconduct, it is possible that a city may be placed on sufficient notice that some state of mind other than a deliberate decision would suffice. See *Tuttle*, 471 U.S. at 821-22; *cf. Pembaur*, 475 U.S. at 480; see, *infra*, pp. 33-34. However, such a claim would arise under the "custom" prong of *Monell* and not under the "policy" prong at issue here. The distinction is an important one.

Unlike a claim for liability based on municipal custom, which requires proof of "persistent and widespread" practices. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167 (1970), a Section 1983 claim based on municipal policy may arise from a single act. See *Tuttle*, 471 U.S. at 821; *Kibbe*, 107 S.Ct. at 1115; *Pembaur*, 475 U.S. at 480. If the *Monell* limitations on municipal liability inherent in the policy requirement are to have any force, this Court must reaffirm that municipal liability based on a single act only arises where there is "a *deliberate* choice . . . ." *Pembaur*, 475 U.S. at 483 (emphasis added). In the absence of such an intent requirement, it will be almost impossible for a city to rebut the common charge that it had a "passive" policy of failing to train or failing to supervise. Indeed, all that a Section 1983 plaintiff would need to do is *assert* that training was inadequate and the case could be submitted to the jury under the "policy" of inadequate training.

This problem is well illustrated by this case because there was no evidence at trial that the City deliberately chose to limit the training of jailers for any reason, much less with the expectation that such an approach might restrict the access of detainees to medical care. To the contrary, the only reasonable inference from the evidence is that the City chose to confer discretion upon experienced police officers who could competently decide whether medical care was warranted and have such care supplied under the relatively clear guidelines embodied in the City's regulation. See *supra*, pp. 4-5. Thus, to the extent that there was any evidence of a deliberate choice, it was not a choice to disregard the constitutional rights of any citizen.[14]

Because the evidence concerning the source of the "policy" was so inadequate, the court of appeals was required to employ a theory of liability which allowed the plaintiff to argue that an unspoken "policy" of inadequate training caused the constitutional injury—despite the existence of an undisputed written policy which was designed to prevent such injuries.

3. Finally, the theory of inadequate training adopted by the court of appeals fails to ensure that the "municipal policy must be 'the moving force of the constitutional violation.' " *Tuttle*, 471 U.S. at 820 (quoting *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981)). This Court has made it clear that this "causation" requirement of a municipal liability claim is a significant one. A Section 1983 plaintiff must establish "that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense."

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[14] In addition, there was no evidence that any decision about the level of training was made by a policymaker of the City. For all that appears in the record, city officials may have assumed that jailers were receiving paramedical training as part of their regular training program. Thus, the policymaker requirement for a finding of municipal policy has not been satisfied.

Pembaur, 475 U.S. at 482 n. 11 (emphasis in the original). See *Martinez* v. *California*, 444 U.S. 277, 284-285 (1980).

As the plurality in *Tuttle* explained, the stringent analysis of the causation element is inherent in the "policy" test for municipal liability under Section 1983. The purpose of the *Monell* policy requirement is to distinguish those injuries for which municipal governments are truly *responsible*—*i.e.*, injuries caused by their "own illegal acts," see *Pembaur*, 475 U.S. 478-79—from injuries caused by the acts of municipal employees. See *Tuttle*, 471 U.S. at 818; *Pembaur*, 475 U.S. at 479-80. But, simply identifying a municipal policy that has some connection to the constitutional violation alleged is insufficient. This is so because "almost any injury inflicted by a municipal agent or employee ultimately can be traced to some municipal policy." *Kibbe*, 107 S.Ct. at 1120 (O'Connor, J., dissenting). In *Tuttle*, the plurality explained that

> if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the police officer] would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

471 U.S. at 823. Thus, in order to assure that the assignment of liability under Section 1983 reflects a realistic appraisal of responsibility, a showing of "but for" causation will not be enough. Instead, "there must be an affirmative link between the policy and the particular constitutional violation alleged." *Id.* In other words, the Section 1983 plaintiff must show that a municipal policy was the "moving force" of the injury, not just one of many possible links in the chain of causation.

Assuming arguendo that constitutional injury was established by the officers' failure to send Mrs. Harris to

the hospital during the 30-40 minutes she was in custody, there is simply no basis on this record for concluding that the officers' medical training had any "causal" relationship to that injury. In order to make such a showing, through expert testimony or otherwise, the respondents would first have to demonstrate "but for" causation, *i.e.*, that a police officer with a different level of training necessarily would have made a different decision in the circumstances. Such a showing would demonstrate that the only factor for which the City could be considered responsible (*i.e.*, training) *may* be causally linked to the injury. But respondents also would have to demonstrate that it was more likely than not that the level of training—and not some other factor such as the indvidiual officer's mental state (see *Tuttle*, 471 U.S. at 830-31 (Brennan, J., concurring))—actually caused the injury in this case.[15] In the absence of any independent evidence to establish this causal link, "the city itself may well not bear any part of the fault for the incident; there may have been nothing that the city could have done to avoid it." *Id.* at 831.

The inadequate training theory enunciated by the Sixth Circuit clearly falls short of the required standard for proving that a municipal policy is the moving force

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[15] Based on the record developed at trial, the City clearly cannot be held liable under a proper instruction on the "causation" requirement. The difficulty with respondents' argument (and with inadequate training theories generally) is that "any number of other factors," including "the disposition of the individual officers, the extent of their experience with similar incidents, [and] the actions of the other officers involved," were "equally likely to contribute or play a predominant part in bringing about the constitutional injury." See *Kibbe*, 107 S.Ct. at 1120 (O'Connor, J., dissenting). To allow the jury to determine that the officers' training was the "moving force" in the alleged injury, "notwithstanding the large number of intervening causes also at work, . . . appears to be largely a matter of speculation and conjecture"—at least in the absence of some (non-existent) evidence to support respondents' position. See *Id.* at 1120-21.

of a constitutional violation. The court below held that causation may be established by "proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result." Pet. App. 5a. Thus, under the theory of the court of appeals, a showing of "forseeability" is a substitute for causation. This is incorrect as a matter of law and clearly inconsistent with the holdings of this Court.

Even *if* a showing of forseeability without proof of deliberate choice could suffice to establish the appropriate *standard of care* for municipal liability under the "policy" prong of *Monell*, such a showing still would not be sufficient to hold the City liable. Proof of intent—*viz.*, that the City "policymakers deliberately chose a training program which would prove inadequate," see *Tuttle*, 471 U.S. at 823—is a necessary, but not a sufficient, element of liability. Respondents also must prove that there is an "affirmative link" between the deliberate policy choice and the constitutional violation alleged. *Id.* Because the theory of inadequate training established below fails to require *any* proof of causation, it cannot be a legitimate basis for imposing liability on the City under Section 1983.

II. THE CITY OF CANTON CANNOT BE HELD LIABLE UNDER SECTION 1983 FOR FOLLOWING AN ALLEGED "CUSTOM" OF PROVIDING DETAINEES WITH INADEQUATE MEDICAL CARE.

Although the court of appeals analyzed the case strictly in terms of the "policy" prong of *Monell*, it also generally approved the district court's instructions. Pet. App. 6a. Those instructions could be construed to include a "custom" analysis, by which the City would be liable for "implicitly authorizing" a long-standing custom or practice of inadequate medical care for detainees based on inadequate training and supervision. Although it is not

free from doubt whether this issue is actually in dispute, it is clear that on the record in this case, respondents cannot support liability under a theory of municipal "custom."

In relevant part, the jury instructions provided that:

> [F]or the City of Canton and its police department to be held liable under Section 1983, its police department [must be found to have] . . . failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. Under such conditions, . . . the City of Canton may fairly be determined as acquiescing in and implicitly authorizing such violations. In light of the responsibility, authority and force that police normally wield, a city, such as Canton, is considered to have actual or imputed knowledge of the probable consequences that arise from inadequate supervision of the police department.

Tr. 4-388—4-389. This theory of municipal liability arguably based on custom, like the court of appeals' "policy" theory, is inconsistent with the decisions of this Court.

The fundamental defect in this theory of municipal "custom" is that it fails to require that the jury find that a "custom" of providing inadequate medical care actually existed. Based on the instruction provided, the jury is free to conclude from a *single incident* that the City had a "custom" of providing inadequate medical care to detainees and therefore may be held liable directly. Such an instruction was necessary to sustain liability because there is no evidence in the record of any denial of medical treatment to any person in police custody other than the arguable incident involving Mrs. Harris.

Although a single decision by a municipal policymaker can establish municipal policy, *Pembaur*, 475 U.S. at 470, a single incident cannot establish a municipal custom. It is simply impossible to conclude from the examination of a single incident whether the incident represents an aberrational occurence or a reflection of a longstanding custom or practice of the City. The reason that a single incident will not support liability is not that municipal governments are entitled to "one free bite" at constitutional rights. Rather, it is because only a repeated course of conduct or practice leading to constitutional injury will give rise to a reasonable inference that the city is on notice of the practice and has given the practice its tacit authorization. In other words, a single incident is insufficient to establish that the city has deliberately (or even recklessly) adopted the custom or practice at issue.

By contrast the approved instruction allows the jury to draw an inference of municipal responsibility for inadequate medical care "even in the face of uncontradicted evidence that the municipality . . . met the highest . . . standards of providing such care imaginable." *Tuttle*, 471 U.S. at 821. Indeed, the instruction—by failing to provide any guidance to the jury in determining the "adequacy" of medical care—virtually invites the jury to hold the City liable. But, as this Court first made clear in *Monell*, a City may only be held liable for "practices" that are "so permanent and well settled" as to have "the force of law." *Monell*, 436 U.S. at 691. In the face of the City's expressly stated policy of providing medical care to detainees in need of medical attention, respondents did not and could not prove a permanent and well-settled practice to the contrary. Therefore, the record fails to establish municipal liability based on "custom."

CONCLUSION

The order of the court of appeals remanding for a new trial should be vacated and the cause remanded for dismissal of the complaint.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioner

May 5, 1988

* Counsel of Record

RESPONDENT'S

BRIEF

No. 86-1088

In The

Supreme Court of the United States

October Term, 1987

CITY OF CANTON, OHIO,

Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS, BERNADETTE HARRIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

DAVID RUDOVSKY*
ADAM THURSCHWELL
KAIRYS & RUDOVSKY
924 Cherry Street, #500
Philadelphia, Pa. 19107
(215) 925-4400

STEVEN M. FITTEN
EMANUELLA HARRIS GROVES
DEXTER W. CLARK
22650 Lorrain Road
Fairview Park, Ohio 44126

Counsel for Respondent

*Counsel of Record

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STATEMENT OF THE CASE

On the morning of April 26, 1978 respondent, Geraldine Harris, was driving her daughter to school when she was stopped by an officer of the Canton Police Department for going 35 miles per hour in a 20 mph zone. While the officer questioned her about a traffic violation, Mrs. Harris collapsed on the ground, and was physically pushed onto the floor of a police wagon. Tr. 1-166; 3-56-57.[1]

Mrs. Harris testified that she had been fully cooperative, but that she was treated in a rough and discourteous fashion, and that when she protested this treatment the officer told her "she was going to jail." Tr. 1-163. The officer testified that she had produced her driver's license, but that she became belligerent and would not disclose other information necessary for writing a traffic citation. The officer decided to arrest respondent and called for the police wagon to transport her to the police station.

While Mrs. Harris was being taken to the station, the arresting officers contacted their supervisor to advise of the need for probable medical assistance at the station. Tr. 2-77; 2-91. The wagon was met by Captain Alan Maxson

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[1] Petitioner's Statement of the Case is written as if it was the verdict winner in the trial court. Evidence favorable to respondent is ignored and conflicting testimony is resolved in favor of the petitioner. At this stage in the case, since respondent prevailed in the district court on the claim of denial of medical treatment, all evidence relating to that claim must be viewed in the light most favorable to the respondent. See *Continental Ore Co. v. Union Carbide Co.*, 370 U.S. 690 (1962).

who determined that Mrs. Harris was "unable to get out [of the wagon by] herself." Tr. 2-80. When she was taken out of the wagon and into the station she immediately collapsed and fainted on the floor of the police booking room. Tr. 1-171. The police laughed at her condition. Tr. 170. Captain Maxson asked Mrs. Harris if she needed medical attention; she responded that she wanted "Ronnie." Tr. 2-81.

The police twice attempted to place Mrs. Harris in a chair, but on both occasions she again collapsed to the ground. Tr. 3-234-5. She continued to be in a disoriented and incoherent condition. Tr. 2-80. Captain Maxson responded to this situation by having her remain on the floor of the station for ten minutes, Tr. 2-83, after which she was placed in a jail cell. Mrs. Harris claims she was searched by male officers. Tr. 1-172-73. She fainted again while she was in the cell, Tr. 1-174, and was later found by her son Ronnie lying on the "filthy floor" of the cell. Tr. 2-16-17. Ronnie Harris arranged for an ambulance to transport respondent to the hospital. Medical treatment was delayed at this point when the police insisted that they fingerprint Mrs. Harris, even as she lay on a stretcher ready to leave for the hospital. Tr. 2-21.

The police had not been provided any training with regard to medical treatment of individuals suffering from emotional distress. Tr. 2-164. Further, a police officer testified that it was the practice of the police department to provide medical attention in such cases only where the individual was a clear danger to herself. Tr. 3-236-237.

Mrs. Harris was in police custody for close to two hours. Tr. 2-28. When she was finally taken to the hospital

she was suffering from hysteria, hyperventilation and severe anxiety and depression. Tr. 1-98-104. She was hospitalized for one week. This condition was caused by her confinement in the jail without necessary medical treatment. Tr. 2-38.

Mrs. Harris, a 52-year-old black woman, had never previously been arrested. She is the mother of eight children, all of whom have graduated from college and have gone on to professional careers. Her confinement caused deep feelings of disgrace and humiliation. She developed a strong fear of the police. Her husband testified that she had become a "different person" since the incident. Tr. 2-3. Mrs. Harris continued to suffer from these conditions for a lengthy period of time following the incident. Tr. 2-6; 1-104-108.

At trial, the case presented three claims under 42 U.S.C. § 1983. Mrs. Harris alleged that she was (1) the victim of excessive force at the scene of her arrest, (2) again physically abused at the police station, and (3) denied necessary medical treatment at the police station. The first two claims were made against individual officers and officials; the claim for denial of medical treatment was stated only against the petitioner, City of Canton. The district court directed a verdict as to the Mayor and Police Chief and the jury found for the remaining individual defendants on the first two claims.

The evidence with regard to the claim of denial of medical attention was established by the testimony of respondent, her medical doctors and various police officers. Tr. 1-163-180; 1-94-104; 2-16-28; 2-80-90. The jury's verdict was predicated on its determination that Mrs.

Harris was in fact denied her right to necessary medical treatment. This aspect of the verdict was not appealed by the petitioner and the issue is not before the Court.

On the issue of the City's liability, respondent introduced evidence that demonstrated that the regulation concerning medical treatment (City of Canton Police Regulation 334.7 (J.A.34)) was not applied as written. The failure to provide necessary medical care to Mrs. Harris resulted both from the City's failure to train its police officers with respect to the provision of medical attention and from the City's custom of distinguishing between physical and emotional ailments in assessing the need for medical treatment: where the individual is suffering from stress, hysteria or other mental disturbance, medical care is not provided unless the police determine that the individual is clearly dangerous to himself. Tr. 3-236-27.

The jury returned a verdict in favor of respondent on the denial of medical attention claim and awarded her $200,000 in compensatory damages. The trial court denied the City's motion for directed verdict and motion for judgment notwithstanding the verdict. The City's legal position on these motions (and in the Court of Appeals) was that inadequate training amounting to gross negligence *would be* sufficient to establish City liability. See Section I, *infra*.[2]

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[2] Even though the City itself stated that the proper standard for liability on a failure to train claim was gross negligence, the trial court instructed the jury that respondent had to prove that such failure to train or supervise was the "result of deliberate indifference." Tr. 4-388-89.

The Court of Appeals reversed the judgment against the City because the trial court had given an improper alternative theory for municipal liability (participation of supervisory officials). The case was remanded for a new trial. The Court of Appeals ruled that sufficient evidence was produced to support a jury verdict based on a theory that lack of training caused the constitutional violation in this case.

SUMMARY OF ARGUMENT

1. Certiorari should be dismissed as improvidently granted because petitioner failed to preserve for review the principal issues it now argues in this Court. For the first time in this litigation, petitioner asserts that a failure to train can never amount to a policy under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Petitioner further claims that only policies unconstitutional in themselves can create municipal liability.

Petitioner took the exact opposite position in the lower courts. At trial, petitioner conceded that it could be held liable for "a failure to train its police force" or for "grossly negligent training . . . " Tr. 4-113. On appeal, the City, as late as its Petition for Rehearing, asserted that the Court of Appeals "correctly in our view, states that grossly inadequate training may be a basis for a City's liability under Section 42 U.S.C. § 1983." Furthermore, the Petition for Writ of Certiorari presented questions for review that were premised on the view that lack of training could be a basis for municipal liability where a city "should have known that training was inadequate" and

that "violation of constitutional rights might foreseeably result." 56 U.S.L.W. 3601 (March 7, 1988).

This Court should adhere to its long standing rule limiting review of issues to those that were raised and argued below. In *City of Springfield v. Kibbe*, 480 U.S. ___, 107 S.Ct. 1114 (1987), the Court dismissed certiorari as improvidently granted under circumstances virtually identical to those presented by this case. There, as here, petitioner's legal position at trial and on appeal was that grossly negligent training could be the basis for municipal liability.

The only issue properly preserved for review is whether there was sufficient evidence to support a jury verdict on any theory of municipal liability. This issue is not sufficiently important to warrant independent review and certiorari should be dismissed as improvidently granted.

2. Assuming the Court reaches the issue, it should find that the evidence was sufficient to establish municipal liability for the deprivation of respondent's right to medical treatment. Every court of appeals and each Justice of this Court that has considered the issue has agreed that a municipality's failure to train or supervise its police officers can under appropriate circumstances amount to a violation of § 1983. Section 1983 and *Monell* impose liability for city policies that require, authorize, or otherwise cause unconstitutional conduct. A city can cause a constitutional violation by its policy of failing to train its police with regard to the constitutional limitations on their powers as surely as it can cause violations by policies that require or authorize misconduct.

The City requests this Court to fashion a broad exception to the principle set forth in *Monell*, that municipalities are liable for constitutional violations which their actions cause, by holding that evidence about training is simply irrelevant to a Section 1983 action. Such a rule would ignore the reality that training and supervision are the primary ways in which municipalities announce and implement policy with regard to police and other employees.

Gross negligence is the appropriate standard for judging whether municipal liability is established by a failure to train. This level of culpability is sufficiently strict to ensure that a jury's finding of causation is not based on speculation and that fault, as opposed to vicarious liability, is the basis upon which municipal liability has been found.

3. The constitutional violation in this case was caused as well by a custom and practice of the City of Canton. Custom may be established where the city, through its employees, follows a repeated course of conduct from which a jury can infer that the city is at fault for failing to correct an improper practice, that it is foreseeable that the practice will cause constitutional violations, and that the violation at issue was caused by this custom. There is no requirement that the course of conduct had previously caused other constitutional violations. Further, the custom may be contrary to written city policy.

4. The evidence was sufficient to establish that the lack of training and the custom of denying medical treatment to persons in police custody who are suffering from emotional ailments caused respondent's injuries.

The evidence established that no training was provided to police with respect to the symptoms or treatment of persons suffering from mental distress or emotional illness. It was clearly foreseeable that the failure to train police would lead to the denial of necessary medical treatment to persons in respondent's condition. The evidence also established that the City had a custom and practice of denying medical treatment to persons suffering from emotional as opposed to physical ailments. The practice of the City was to refer such cases to the hospital only where the person was clearly dangerous to herself, thus creating the very high risk that certain persons in respondent's condition would be denied necessary treatment. The failure to seek treatment for respondent, a disoriented woman, who had fainted, collapsed and was hyperventilating on the floor of the police station, was part of the custom and practice of the City of refusing medical care in these situations.

ARGUMENT

I. Certiorari Should Be Dismissed As Improvidently Granted Since The Issue Of Whether A Failure To Train May Constitute A Policy For Purposes Of Municipal Liability Under *Monell* Is Not Properly Before The Court.

Petitioner's principal argument in this Court is that a city's failure adequately to train its employees cannot constitute a policy for purposes of municipal liability under 42 U.S.C. § 1983. Brief of Petitioner, 7-10, 11-30. This issue is not properly presented to this Court because petitioner explicitly conceded that it could be held liable

under a theory of inadequate training at every stage of the proceedings in the lower courts.

In its brief submitted prior to trial, the City argued:

> Plaintiffs must prove that whatever emotional distress or physical harm they may have suffered was proximately caused by a breach of a duty owed to them by the Defendants either by direct action or as a result of misfeasance and nonfeasance *by failing to adequately train, supervise, and discipline members of the police force*. Record, Document No. 10, at 3 (emphasis added).

This position was confirmed in the City's oral motion for a directed verdict after the close of respondent's case:

> City of Canton could be held liable . . . under improper training of its police officers . . . that is when a municipality fails to train its police force or recklessly trains its police force or is grossly negligent in training its police force.[3] Tr. 4-113.

Consistent with this position, following the presentation of the evidence and the charge to the jury, petitioner's sole objection to the jury instruction on city liability was that it was "simply a glorified version of a respondeat superior instruction."[4] Tr. 4-424. The City

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[3] Petitioner renewed its motion for directed verdict at the close of defendants' case, arguing that there was insufficient evidence to make out a policy or custom. Training was not mentioned. Tr. 4-356.

[4] The jury charge stated two alternative bases for city liability: that the City's "police department and/or its supervisory personnel . . . participated in the actual misconduct" or that the City "failed to supervise its police force and that such

(Continued on following page)

made no objection to the trial court's instruction on liability for a failure to supervise adequately or the standard of care required for finding such liability. The instruction authorized a verdict if the City's failure to supervise "was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizens' rights were probably certain to result."[5] Tr. 4-389. Petitioner's motion for judgment notwithstanding the verdict was similarly silent on this issue. Pet. App. 4a.

In the Court of Appeals, petitioner pressed the *respondeat superior* objection and its claim that the evidence was insufficient to prove a policy of denying medical treatment to prisoners, but again failed to object to (or

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(Continued from previous page)

supervision was so reckless, grossly negligent, inadequate and the result of deliberate indifference that police misconduct and violations of citizens' rights were probably certain to result." Tr. 4-389.

[5] The trial court's instructions on city liability emphasized that *respondeat superior* was not applicable:

> you may not return a verdict against the City of Canton if you believe, from a preponderance of the evidence, that Mrs. Harris was denied medical treatment by a Canton police officer merely because of the fact that said police officer was an employee of the City of Canton. Tr. 4-390.

Thus, it is clear that petitioner's objection was directed only to the instruction predicating liability on participation by supervisors.

even mention) the imposition of liability for a failure to train or supervise.[6]

Perhaps most telling, after the Court of Appeals issued its opinion in this case, the City *expressly agreed* with that court's conclusion that a failure to train stated a valid basis for imposing liability on a municipality. In its Petition for Rehearing – which, ironically, argued that the issue of training was not properly before the Court of Appeals – the City stated: "The majority opinion, quite correctly in our view, states that grossly inadequate training may be a basis for a City's liability under Section 42 U.S.C. 1983 . . . " Petition for Rehearing, Court of Appeals, at 1.

The Petition for Writ of Certiorari does not repudiate those express statements and clearly assumes that there are circumstances in which a failure to train will constitute an actionable municipal policy. Question No. 1 implies that inadequate training is actionable where the city "should have known that training was inadequate" and that "violation of constitutional rights might foreseeably result." 56 U.S.L.W. 3601 (March 7, 1988). Similarly, Question No. 2 relates to burden of proof and Question 3 to the type and degree of training required to insulate a municipality from liability.

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[6] Petitioner's sole reference in its brief in the Court of Appeals to the "failure to supervise" theory was made in the context of arguing – erroneously – that the trial court's jury instruction permitted the jury to infer a municipal policy of failing to give adequate medical attention from a single instance of such conduct. Brief for Appellant, Court of Appeals, at 27.

Petitioner's argument in support of certiorari assumed the validity of the failure to train theory. See, e.g., Petition at 8 ("the question is what showing of deliberate decision making on the part of municipal policymakers is required to support a finding that the City adopted a 'custom or policy' of inadequate training"); *id.* at 11 ("Particularly in cases such as this, where the custom or policy alleged is a city's failure to train . . . it is important that the lower courts and litigants have clear guidance with respect to the requirement that the violation must be proven to have occurred 'pursuant to' the City's custom or policy").

Furthermore, the record in this case does not squarely present the issue of the appropriate standard of culpability for claims that a municipality is liable for its failure to train its employees. The City expressly adopted the gross negligence standard in its motions for directed verdict, Tr. 4-113, and again endorsed the gross negligence standard in the Petition for Rehearing (p.1) before the Court of Appeals. The district court's instruction to the jury specified a higher standard of fault, requiring the City's failure to be "so reckless, grossly negligent, inadequate, *and* the result of deliberate indifference that police misconduct and violations of citizens' rights were probably certain to result." Tr. 4-389 (emphasis added).

In short, at the eleventh hour, petitioner seeks to challenge in this Court holdings of the Court of Appeals that petitioner has itself asserted throughout this case. As Justice Frankfurter observed when faced with a similar reversal of legal position in *Abel v. United States*, 362 U.S. 217, 232 (1960), "[a]ffirmative acceptance of what is now sought to be questioned could not be plainer."

This Court ordinarily limits its review to issues that were raised and argued below. *California v. Taylor*, 353 U.S. 553, 556, n. 2 (1957). Whether this limitation is jurisdictional or prudential, see *Bankers Life and Casualty Co. v. Crenshaw*, ___ U.S. ___, 56 U.S.L.W. 4418, 4420 (May 17, 1988), at a minimum it counsels against treating issues that were not only not raised below, but were explicitly incorporated by the party raising the issue in this Court as part of its own theory of the case. *City of Springfield v. Kibbe*, 480 U.S. ___, 107 S.Ct. 1114 (1987); *Abel v. United States*, 362 U.S. 217, 230-232 (1960).

This salutary rule guards against unscrupulous litigation strategies. A contrary rule would permit a party to present an erroneous legal theory as insurance for an appeal. Furthermore, adherence to the rule insures that the Court's "need for a properly developed record on appeal" is satisfied. *Crenshaw*, 56 U.S.L.W. at 4420; see also *Illinois v. Gates*, 462 U.S. 213, 224 (1983) ("fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances").[7]

Observing these "customary limitations on [the Court's] discretion" in this case will also "promote

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[7] The issue of failure to train is not necessarily dispositive of this case. As we demonstrate below, the constitutional violation was caused by a combination of the City's custom of denying medical care to persons suffering from emotional disturbance and the City's failure adequately to train its police force.

respect for the procedures by which [the Court's] decisions are rendered, as well as confidence in the stability of prior decisions." *Gates*, 462 U.S. at 224. Although it may be appropriate in some circumstances for the Court to overlook technical defects in the record (such as a failure to object to a jury instruction pursuant to Rule 51), where the issue has otherwise been raised and fully litigated below,[8] it would defy sound principles of judicial restraint – and invite unscrupulous litigation practices – to permit a litigant to reverse his explicit and consistent former position on appeal.

This case bears a striking resemblance to *City of Springfield v. Kibbe, supra.* As in *Kibbe*, petitioner explicitly adopted at trial and on appeal the very legal principle – the viability of the grossly negligent training theory of municipal liability – that it now challenges in this Court. 107 S.Ct. at 1115. In *Kibbe* the city had at least argued in its motions for directed verdict and motion for judgment notwithstanding the verdict that it should not be held liable even for its grossly negligent failure to train. 107 S.Ct. at 1118 (O'Connor, J., dissenting). Here, by contrast, petitioner expressly adopted the training and the gross negligence standards in its motions in the district court.

The record before the Court contains none of the factors that justify review of issues despite the failure to comply with procedural rules. In *Praprotnik*, the Court found that the issue had been preserved even though the

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[8] See e.g. *City of St. Louis v. Praprotnik*, ___U.S.___, 108 S.Ct. 915 (1988); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

petitioner failed to object to the relevant jury instruction because the petitioner's position in its various motions in the district court was consistent with its position on appeal. Similarly, the Court's decision to consider the "single occurrence" instruction in *Tuttle* was based on respondent's failure to raise its Rule 51 objection until its brief on the merits, even though the petitioner had clearly argued the "single incident" theory before the Court of Appeals and had presented it in the petition for writ of certiorari. 471 U.S. at 815-16. Here, petitioner conceded in the Court of Appeals the very point it now disputes.[9]

Having consistently maintained that municipal liability could be based on inadequate training, and having consistently embraced a gross negligence standard, petitioner now denounces the lower courts for applying those very principles. This sleight of hand response to the

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[9] Respondent has not waived her objection. Given petitioner's explicit avowals of the validity of the training theory, the Petition for Writ of Certiorari would have had to be extremely clear to put respondent on notice of the change in position. Even if some language in the Petition could be stretched to suggest this new position, it was improbable at best that the City would raise the sweeping argument that it now presses on the Court. As this Court ruled in *Kibbe*:

> It would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage not only to the petitioner's failure to preserve the questions actually presented, but also to his failure to preserve any questions fairly included within the questions presented but uncontested earlier. Respondent strenuously objected to petitioner's raising this question at the first point that she was on notice that it was at issue in this case – in her response to petitioner's merits brief. *Id.* at 1116.

failure of the City's evidentiary arguments below should be rejected.

The only issue properly before the Court is whether the evidence was sufficient to support the jury verdict that a custom or policy caused the constitutional injury. This issue is not sufficiently important to warrant independent review and certiorari should be dismissed as improvidently granted. *Kibbe, supra,* 107 S.Ct. at 1116; *Belcher v. Stengel,* 429 U.S. 118 (1976) (per curiam).[10]

II. The Evidence Presented At Trial Was Sufficient To Establish Municipal Liability For The Deprivation Of Respondent's Constitutional Right To Medical Treatment Based Upon The City's Failure To Train Its Police Officers And The City's Custom And Practice Of Denying Necessary Medical Care To Persons Suffering From Emotional Distress.

It is our central submission that the evidence presented at trial was sufficient to support the verdict against the City of Canton under two theories of municipal liability. First, the City had a policy of recklessly failing to train or supervise its police officers with respect to their responsibility to provide necessary medical care to persons visibly suffering from emotional disturbances or distress. This failure to train created a substantial and foreseeable risk that constitutional rights would be denied. Second, and closely related to this failure to train,

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[10] Indeed, because petitioner has been granted a new trial, it will be able to fully litigate the municipal liability issue at trial and any evidentiary issues will be subject to review. In *Kibbe,* the dismissal of certiorari resulted in an affirmance of the judgment of the district court.

the City's custom and practice was to deny necessary medical treatment to persons in police custody suffering from various forms of emotional distress.[11] This custom has clearly superseded the written Police Regulation as the controlling practice in the City of Canton.

Since the Court of Appeals has granted petitioner a new trial, the sole issue presented is whether there was sufficient evidence presented that a jury could conclude that *any* policy, custom or practice of the City caused the constitutional deprivation. Because we rely on theories of liability that include a policy of failure to train and an unconstitutional practice or custom, we first set forth the legal principles which establish these theories of municipal liability under *Monell.* We then turn to an application of these legal principles to the proof at bar.

A. Liability Based On Training And Supervision Policies.

Petitioner argues that a municipality's failure to train or supervise its police officers and other employees can never amount to a violation of § 1983. This argument lacks both precedent and logic. Indeed, it has been explicitly rejected by the seven Justices of this Court who have discussed the issue, see *City of Oklahoma City v. Tuttle, supra* at 829 (Brennan, J. concurring); *Kibbe, supra* at

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[11] That respondent was in fact deprived of her constitutional right to medical care is not in dispute in this Court. A properly instructed jury found that such a deprivation was caused by the failure to provide medical care while respondent was in jail. Petitioner did not appeal from that aspect of the judgment.

1121 (O'Connor, J., dissenting), and by every court of appeals that has addressed the question. See, e.g., *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987); *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987); *Warren v. City of Lincoln*, 816 F.2d 1254 (8th Cir. 1987); *Wierstak v. Heffernan*, 789 F.2d 968 (lst Cir. 1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986); *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (en banc); *Rymer v. Davis*, 775 F.2d 756 (6th Cir. 1985); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); *Rock v. McCoy*, 763 F.2d 394 (10th Cir. 1985); *Bergquist v. County of Cochise*, 806 F.2d 1364 (9th Cir. 1986).[12]

In its eagerness to displace well-settled principles of statutory construction of § 1983, petitioner distorts this Court's municipal liability cases to construct a novel "bright-line" test for determining policy in *Monell* litigation. Brief for Petitioner at 13, 16, 17. Petitioner urges a re-writing of established principles in a manner that would exempt from municipal liability a broad range of policies and practices that manifestly cause deprivations of constitutional rights. A bright-line would be achieved by petitioner's test, but at the plainly unacceptable price of altering established doctrine and undermining the very teachings and purposes of § 1983.

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[12] There has been disagreement on the question of the level of culpability in the failure to train or supervise that will be required to impose municipality liability. That issue is discussed *infra* at Section II, B.

Monell held that a city could be held liable in a § 1983 action whenever a city policy had caused a constitutional violation to an aggrieved plaintiff. Petitioner urges this Court to fashion a broad exception to that rule, under which a deliberately adopted municipal policy regarding training or supervision can never be the basis of municipal liability, regardless of whether that training or supervision policy had the direct, entirely predictable or inescapable effect of causing serious constitutional violations. Petitioner insists that such evidence, no matter how substantial, is simply irrelevant to a § 1983 action.[13]

The policies for which *Monell* holds a municipality accountable are the official actions or practices that establish the operative rules of action which guide the conduct of subordinate employees. Training and supervision are at least as important a part of the process by which a city makes and announces policy (and affects the conduct of its employees) as the written memorandum in *Monell* or the telephone call in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). For some municipal employees, including police

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[13] Amici, International City Management Association, et al., urge that lack of training is not actionable unless it amounts to a policy that is unconstitutional itself. Interestingly, many of the same Amici expressly disavowed this view of *Monell* in their amicus Brief in *Kibbe, supra*, where they stated that a City "can be hel. liable under 42 U.S.C. § 1983 for providing inadequate police training if a deprivation of constitutional rights results from a municipal policy of inadequate training." Brief Amicus Curiae of U.S. Conference of Mayors, et al., p.5, *City of Springfield v. Kibbe, supra*.

officers, training and supervision are virtually the exclusive manner in which a city announces and implements its policies.

There is no valid or meaningful distinction under § 1983 between an unconstitutional city policy and an otherwise improper city policy which directly causes a constitutional violation. This point is readily appreciated by considering the issue of constitutional limitations on the use of deadly force. In *Tennessee v. Garner*, 471 U.S. 1 (1985), state and city policies permitted police offices to use lethal force against nonviolent fleeing felons, but did not obligate the police to do so. After *Garner*, a city's failure to train its officers that certain uses of deadly force are unconstitutional would reasonably be understood as similarly authorizing such action, even where the City Council or Mayor announced an intent to abide by the constraints of the Fourth Amendment. If police officers are not trained to comply with this limitation on their power, it is clearly foreseeable, indeed substantially certain, that an improperly trained police officer will shoot and kill a suspected car thief, pickpocket or some other non-dangerous fleeing suspect.

The same reasoning applies to the Fourth Amendment principles of *Payton v. New York*, 445 U.S. 573 (1980). Violations of constitutional rights are as likely to occur where a police department (1) expressly authorizes entries into homes to arrest suspects where the police have an arrest warrant, but not a search warrant or exigent circumstances; (2) has no written policy, but trains its officers to enter homes if an arrest warrant is in hand; or (3) has a written policy requiring compliance

with all Fourth Amendment doctrines, but does not train its officers as to the requirements of the Fourth Amendment under *Payton*. Apparently, petitioner would label (1) as a *Monell* violation, but not (2) or (3). Such a semantic distinction is illogical and thoroughly inconsistent with § 1983 and *Monell*.[14]

Petitioner's argument that only "unconstitutional" city policies can lead to municipal liability is also inconsistent with the language of § 1983 which imposes liability on "any person, who, under color of law . . . shall subject, *or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." (emphasis added). The statute clearly contemplates that the defendant might become liable in either of two ways: by directly violating a plaintiff's constitutional rights, or by "causing" another party to do so. *Monell* itself recognized the existence of this second ground of recovery, noting that "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort. . . ." 436 U.S. at 692. *Monell* concluded that § 1983 "clearly imposes liability on a government that, under color of some official policy 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692.

This second type of liability applies to individuals and municipalities. If a city police chief, to whom

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[14] Given this Court's constant interpretation of the Constitution, including cases with direct impact on the powers and responsibilities of police officers, constitutional rights of individuals in a wide array of circumstances are dependent upon proper training and supervision of the police.

responsibility for making city law enforcement policy had been delegated, adopted a practice of hiring or retaining on the force individuals with a known proclivity for excessive and unprovoked violence, the police chief and the municipality should be liable when that practice led to inevitable abuses by the officers involved. Similarly, if the chief directed that new officers be taught to do all in their power to capture fleeing felons, and directed that the training curriculum contain no mention of the constitutional restrictions announced in *Tennessee v. Garner, supra,* the chief and the municipality should be held legally responsible if one of the officers so trained proceeded to kill a fleeing non-dangerous felon.

Imposition of municipal liability based on training or supervision is consistent with the normal rules of agency. When the rule of *respondeat superior* is inapplicable, a principal is still under a duty to exercise reasonable care in the selection, training, instruction and supervision of its agents.[15] That agency principle was well established when § 1983 was originally adopted in 1871, and application of that principle under *Monell* was expressly approved by the plurality opinion in *Tuttle,* 471 U.S. at 818-19, n.5. Where the violation of that duty is caused by the acts of a policymaker and thus may fairly be attributable to the city, liability is direct, not vicarious, and there

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[15] *Restatement (Second) of Agency,* § 213 (1958): "Principal Negligent or Reckless;" see also *Monell, supra* at 694 n.58; *Cutter v. Town of Farmington,* 498 A.2d 316 (N.H. 1985); Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N.C.L.Rev. 517, 558-559 (1987).

is no reason to think that the framers of § 1983 intended to establish any standard of care or definition of proximate causation different from those applicable to other principals.[16]

The City's reliance on *Praprotnick* is misplaced. At issue there was the question of whether a subordinate city employee's discretionary decisions, which were subject to review by the city's authorized policy makers could be deemed established city policy under *Monell.* The Court rejected the argument that a policymaker's single failure to investigate a subordinate's decision constituted a violation of § 1983. The court below anticipated

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[16] The legislative history of § 1983 makes clear that Congress was concerned not only with blatantly unconstitutional policies and customs, but also with more subtle constitutional violations resulting from failure to comply with facially constitutional statutes. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the statute]." *Monroe v. Pape,* 365 U.S. at 174-75. Representative Sheldon, in arguing for passage of the statute said:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through its courts, in times of peace, directly to the individual who is deprived of his rights, . . . whether through the positive act *or the default of the State authorities.*

Cong. Globe, 42d Cong. 1st Sess. 367-68 (1871) (emphasis added).

Most modern police departments do not adopt explicitly unconstitutional policies and procedures. But constitutional violations by police officers may result just as surely due to the municipality's failure to train.

Praprotnick in reversing the judgment in this case because the trial court improperly instructed the jury that the mere participation of supervisory personnel could establish municipal liability. *Praprotnick* focussed on the question of which state officials have final policy making authority and did not address the issue on which the petitioner seeks review, whether a failure to train and supervise that is attributable to city policymakers can be a policy or practice under *Monell.*[17]

The decision not to train is unquestionably a course of action deliberately "chosen from among various alternatives." *Tuttle, supra,* at 823. Indeed, to the extent a city does not train or supervise officers because its policymakers did not even consider their responsibility to do so, the fault is more manifest. Liability should not be avoided by an abdication of governmental responsibility. The training, supervision and discipline of police officers are universally accepted norms, and the decision not to train or to train in a grossly negligent manner constitutes a policy no different than any other consciously chosen practice. In this case, liability based on failure to train is consistent with this Court's repeated assertion that municipal liability is to be based on notions of "fault." See *Monell, supra,* at 692, n.57; *Tuttle, supra* at 818 (plurality opinion) and 828 (Brennan, J., concurring).

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[17] Nor does *Tuttle* support petitioner's position. There, the plurality suggested that a claim can be made out "where the policy relied upon is not itself unconstitutional." *Id.* at 824. The three concurring justices rejected the bifurcation of the constitutional inquiry as a "metaphysical distinction." *Id.* at 833, n.8 (Brennan, J., concurring).

Diverse authorities recognize the vital role of police training.[18] Training with regard to the provision of medical care by jailers is a practice that is urged by many professional organizations concerned with proper standards for police activity and is the subject of widely disseminated standards and training curriculum. For example, the American Correctional Association has promulgated standards for police holding facilities that mandate training in the "recognition of signs and symptoms of mental illness, retardation, emotional disturbance and chemical dependency." ACA Standards For Adult Local Detention Facilities § 2-5271 (2d Ed. 1981). See also, Murphy, *Special Care: Improving the Police Response to the Mentally Disabled* 255-279. (Police Executive Research Forum, 1986) (listing and discussing training programs and materials); Levinson & Distefano, "Effects of Brief Training on Mental Health Knowledge and Attitudes of Law Enforcement Officers," 7 Journal of Police Sci. & Adm. 241 (1979); *International Association of Chiefs of Police, Training Key No.*

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[18] See, e.g., Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct,* 87 Yale L.J. 447, 457 (1978); P. Schuck, *Suing Government* (1983); Chapman, *Police Policy on the Use of Firearms,* in *Readings on Police Use of Deadly Force,* 224, 234 (J. Fyfe ed. 1982); Rittenmeyer, *Vicarious Liability in Suits Pursuant to 42 U.S.C. 1983: Legal Myth and Reality,* 12 J. Police Sci. & Adm. 260, 265 (1984); Brown, *Use of Deadly Force by Patrol Officers: Training Implications,* 12 J. Police Sci. & Adm. 133 (1984) (improved training reduces likelihood of excessive shooting); Meagher, *Organizational Integrity: The Role of the Police Executive in the Management Process,* 13 J. Police Sci. & Adm. 236, 237 (1985) (strong administrative stand against misconduct alters behavior of officers); Reiss, *Controlling Police Use of Deadly Force,* 452 Annals Am. Acad. Pol. & Soc. Sci. 122, 131, 142-44 (1980).

377. Cf. Standards for Health Services in Jails, National Commission on Correctional Health Care (1986).

Finally, as developed in the Brief Amicus Curiae of the American Civil Liberties Union, *Monell* liability based on the requirement of training is now widely recognized as a major force in the professionalization and reform of police departments. City policymakers have given credence to this Court's admonition that "the threat of damages . . . may encourage . . . internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Studies conducted in the wake of *Monell* and *Owen* establish these salutary results of municipal liability. See, e.g., Schmidt, "Section 1983 and the Changing Face of Police Management," in *Police Leadership in America*, 235 (W. Geller, ed. 1985).

B. The Proper Standard of Culpability

In discussing the training and supervision issues, the courts have not agreed on the level of culpability or fault that is required to render actionable a failure to train under § 1983. See, e.g., *Kibbe, supra*, at 1121 (O'Connor, J. dissenting); *Spell v. McDaniel, supra; Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (en banc). In the event that the Court now chooses to address the issue, we urge that no requirement beyond gross negligence be imposed.[19]

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[19] We again note that petitioner's position in the trial court and in the court of appeals was that gross negligence was a sufficient basis for liability. The trial court's instructions to the jury required a showing of deliberate indifference. Tr. 4-388-89.

Initially, while petitioner intimates otherwise (Brief at 18), it should be stressed that § 1983 has no state of mind or fault components. See *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). To be sure, certain constitutional rights incorporate standards of culpability. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) ("intentional" discrimination); *Estelle v. Gamble*, 429 U.S. 97 (1976); (Eighth Amendment requires showing of "deliberate indifference"); *Daniels v. Williams*, 474 U.S. 327 (1986) (simple negligence not sufficient to prove due process violation). But those culpability standards apply to the individual who directly commits the substantive violation.

Municipal liability involves dual causation: (1) proof of individual conduct and culpability sufficient to establish the underlying deprivation, and (2) proof that the City caused this conduct by a policy, custom, or usage. In this case, the unchallenged jury verdict that respondent was denied medical treatment in violation of the Constitution, was predicated on a finding that the individual officers were deliberately indifferent to her medical needs, thereby satisfying the culpability requirement of the due process clause.

By contrast, *Monell's* focus on fault and causation is a matter of statutory construction and the purposes of *Monell* are best achieved by a standard of gross negligence that imposes a sufficient degree of fault to ensure that municipal liability in cases of policies not unconstitutional themselves will not be based on *respondeat superior*. The legislative history of the 1871 Civil Rights Act makes

clear that Congress believed that liability should be imposed on a city for gross negligence which resulted in a constitutional violation. The rejection of the proposal for strict vicarious liability embodied in the Sherman Amendment formed the basis for this Court's rejection of *respondeat superior* in *Monell*. That amendment was replaced by an express Congressional approval of the use of a negligence-based standard for failure to prevent constitutional violations. Section 6 of the 1871 Act imposed liability on persons who, "having the power to prevent" the deprivation of federal rights by a third party, "shall neglect or refuse to do so" (emphasis added); damages were measured by the amount of injury which "reasonable diligence could have prevented." 17 Stat. 15 (1871).

If, as *Monell* held, the general nature of a city's exposure to liability under § 1983 is to be measured by the city's degree of exposure for failure to prevent abuses by Ku Klux Klan, 436 U.S. at 692, n.57, then the requirement of "reasonable diligence," and the imposition of liability for "neglect," are likewise appropriate where a city's own actions have caused a constitutional violation by its employees.[20]

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[20] The common law standard of negligence, the taking of an unreasonable risk of causing a foreseeable injury, was the traditional standard of "fault" by which civil liability in 1871, as today, was imposed. *The Nitroglycerine Case*, 82 U.S. 524, 538 (1872); *Railroad v. Jones*, 95 U.S. 439 (1877). We propose the gross negligence test to accommodate the concern that some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional. *City of Oklahoma City v. Tuttle, supra*, at 823 (plurality opinion).

The standard of deliberate indifference or reckless disregard adopted by the dissenting opinion in *Kibbe* – though met in this case – will unnecessarily immunize from liability training policies and practices that are clearly improper, and which inevitably cause constitutional violations. As a matter of logic, lack of training resulting from gross negligence can cause the same types of constitutional violations that are caused by policies that are reckless or deliberately indifferent. Some heightened measure of fault will help to ensure that liability is not imposed for remotely foreseeable effects, but gross negligence – a highly unreasonable risk of unconstitutional conduct – has sufficient bite to limit liability to situations where the violation is fairly attributable to the City. Cf. *Smith v. Wade*, 461 U.S. 30 (1983). Where a city unreasonably fails to train its police and that failure is substantially certain to result in a constitutional violation, it is fair to infer that its "actual policies are different from the ones that had been announced." *Praprotnick, supra*, at 928.[21]

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[21] Petitioner suggests that the lower courts have carelessly invoked the failure to train theory to impose liability. To the contrary, where the evidence is lacking, the lower courts have rejected this claim. See, e.g., *Vippolis v. Village of Haverstraw*, 768 F.2d 40 (2d Cir. 1985); *Tompkins v. Frost*, 655 F.Supp. 468 (E.D. Mich. 1987); *Bingham v. City of Pittsburgh*, 658 F.Supp. 655 (W.D. Pa. 1987); *Thompson v. Spikes*, 663 F.Supp. 627, 650 (S.D. Ga. 1987). Cases in which liability has been imposed have generally involved egregious violations of rights caused by a municipality's inexcusable failure to train or supervise. See, e.g., *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (shooting of innocent third party); *Spell v. McDaniel, supra*.

C. Custom and Practice As Predicates of Municipal Liability.

As petitioner acknowledges, *Monell* made clear that municipal liability could be established whether or not a formal city policy exists, where a custom or practice of the City causes the unconstitutional conduct. Congress included "customs" and "usages" in § 1983 because of the persistent and widespread discriminatory practices of state officials . . . . [that] could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell, supra* at 691. See also *Praprotnick, supra* at 925-26; 928; *Adickes v. S.H. Kress & Co., supra,* at 167-68. It is with the establishment of such rules of conduct, not with the writing of words in a ledger destined to gather dust on some obscure shelf, that *Monell* is concerned. As Justice Frankfurter stated in *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369 (1940):

> It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.

Petitioner seeks to limit the custom or usage prong of *Monell* to cases where there have been repeated instances of actual deprivations of constitutional rights. Thus, the City argues that the trial court's instruction on "custom" was improper because "there is no evidence in the record of any denial of medical treatment to any person in police

custody other than the arguable incident involving Mrs. Harris." Brief for Petitioner, 31.

We acknowledge that a "single incident cannot establish a municipal custom," Brief for Petitioner, 32, but we strongly disagree with petitioner's further submission that custom or practice can never be established, no matter how likely that custom is to cause a constitutional violation, until a series of deprivations have actually occurred. Petitioner disavows entitlement to "one free bite," Brief for Petitioner, 32, but that rule is exactly what petitioner urges upon this Court. Quite simply, there are numerous cases (including the instant one) where a practice or custom exists before an actual constitutional violation results. For example, if a City follows a custom of refusing to discipline or train its police officers with respect to their power to use deadly force and police thereby fire at non-dangerous fleeing felons, the city surely cannot defend the lawsuit of the first victim simply because of poor marksmanship in earlier incidents. Repeated violations may be compelling evidence of custom or practice, but such evidence is not a necessary or sole method of proof.[22]

This is not to suggest that where a plaintiff claims practice, custom or usage there is not a significant burden

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[22] Petitioner criticizes the trial court's jury instructions as authorizing a verdict based on a single incident. This is a plainly erroneous view of the instructions, see Tr. 388-89; moreover, given the fact that a new trial was granted by the Court of Appeals, the jury instructions are rendered moot.

of proof in the absence of repeated violations. The proper question is whether the evidence presented gives rise to a reasonable inference that the practice is widespread and well-settled. *Adickes, supra*. Depending upon the alleged practice or custom at issue, this proof may focus on repeated violations, the identity of the persons who have initiated or approved of a practice, or the scope and duration of the custom.

It is conceded that a "repeated course of conduct or practice" can give rise to municipal liability. Brief for Petitioner, 32. If this is so, it is because a jury can reasonably infer that the city has acted (by tolerating or failing to correct the practice), that the city is at fault (by disregarding acts and conduct that cause unconstitutional violations), and that the incident at issue was caused by this practice. Custom and practice as defined by a particular course of conduct, can exist regardless of the conduct's actual consequences. Proof that such a custom exists could be established by direct testimony of city officials, examples of its application and execution, or proof of consistent disregard of actual written policy.

D. The Evidence Is Sufficient to Support The Jury Verdict

The Seventh Amendment severely restricts the extent to which the verdict of a properly instructed jury may be reviewed by a federal court. In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other conclusions

are more reasonable." *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944). A case must be submitted to the jury "[i]f evidence might justify a finding either way . . . " *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949), and "fair-minded men might reach different conclusions," *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353 (1943). In assessing a request for a directed verdict or judgment notwithstanding the verdict, the courts are required "to view the evidence in the light most favorable to [the opposing party] and to give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide, Co.*, 370 U.S. 690, 696 (1962). Further, as this Court recently ruled in *Bourjaily v. United States*, 483 U.S. ___, ___, 107 S.Ct. 2775, 2781 (1987), "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its consistent parts." See also, *Huddleston v. United States*, 56 U.S.L.W. 4363, 4366 (May 2, 1988).

The application of *Monell* frequently requires, as it did here, that the finder of fact resolve conflicting evidence and draw inferences regarding policies, customs and causation. But nothing in *Monell* suggests that the factual issues made critical by that decision are to be resolved by judges rather than juries. There is "no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as all others." *Jones v. East Tennessee V. & G.R.Co.*, 128 U.S. 443, 446 (1888). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

We have previously set forth the related doctrines that authorize a finding of municipal liability in this case: the lack of training and the custom and practice of denying medical treatment to persons in police custody who are suffering from emotional ailments. The evidence was more than sufficient to prove both theories and therefore dismissal of the case is unwarranted.

First, with regard to the lack of training, the jury was entitled to find that police of the City of Canton received no training with regard to the appropriate medical care for persons suffering from emotional disturbances and, indeed some, physical ailments. The police chief, Thomas W. Wyatt, testified that the jailer and his superiors received *no* training with respect to symptoms of mental instability or disturbance, heart attacks or respiratory problems. Tr. 2-164-65.[23] According to Chief Wyatt, medical treatment – and the denial of such treatment – was left to the "good judgment of the officers." Tr. 2-207. Thus, it was clearly the policy of the City, as implemented by a city policymaker (the chief of police, Tr. 3-135), to leave the provision of necessary medical services to the unguided, untrained, and necessarily uninformed discretion of police officers. The jury properly found this policy to be deliberately indifferent to the constitutional rights of those persons needing medical treatment.

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[23] Clearly, this evidence is sufficient to support a jury verdict that no training occurred. Petitioner's argument (Brief, at 22, n.11), that the trial court placed the burden of proving the adequacy of training is neither accurate, Tr. 4-388-89, nor relevant, since a new trial has already been granted.

The fact that the City had a regulation which purportedly required medical care in this case is just the beginning of the appropriate inquiry. By failing to train its jailer and supervisors with regard to the necessary steps that should be taken under the regulation, the city has undermined the very policy it has adopted. A precatory policy, whether it be to provide medical care in appropriate circumstances, not to arrest or search without probable cause, not to infringe one's right to free speech or assembly, or to refrain from excessive force, which is ignored in the training and supervision that is provided to those persons who must implement the policy is no real policy at all. The total failure to train speaks far louder and has far greater impact than a written rule. As Justice O'Connor noted in *Praprotnick, supra,* at 928, "[r]efusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced." See also, *Haynesworth v. Miller,* 820 F.2d 1245, 1274, n.239 (D.C. Cir. 1987).

No one suggests that a doctor, nurse or paramedic be assigned to the police station. What is required is a modicum of training, the materials for which are available from a number of correctional, police and medical associations,[24] to provide officers with the rudimentary information necessary not to treat, but to recognize ailments and to refer for appropriate medical treatment.

The consequences for respondent were serious enough, but they could have been far more grave if her

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[24] See, pp. 25-26, *supra.*

underlying condition was that of a stroke victim, or if the hyperventilation was more acute. What caused the jailer and his supervisors to deny medical treatment for Mrs. Harris was not the actions of "one bad apple," *Tuttle, supra,* at 821, whose behavior could not be foreseen or controlled by the City, but rather was a lack of training that precluded the exercise of "good judgment" and made it both foreseeable and highly likely that medical care would be denied to respondent.

Second, the evidence also established that the City of Canton's custom and usage of providing medical care to persons in police custody differed markedly from the "policy" articulated in Police Regulation 334.7. While the regulation purports to require referral to a hospital in several specific circumstances, the actual practice of the police and the jailer is not to provide medical care to persons suffering from emotional disturbances or disorders unless the person is clearly dangerous to herself.

There is a significant range of disorders – including that suffered by respondent – that would require treatment under the regulation, which by custom are not referred for medical evaluation or treatment. Officer Norcia testified that different standards were applicable in determining whether medical care was necessary, depending on whether the person was physically injured or emotionally disturbed. For physical injuries, police followed the regulation: "if the person was observed to be physically injured, we would take them to the hospital . . . " Tr. 3-236. By contrast, where a person was emotionally disturbed he or she would not be taken to the hospital except in extremely serious situations. Thus, where a person is in an hysterical condition, the police

first "try to calm them" and "try to prevent them from hurting themselves." Tr. 3-236. If that is not successful they would be put "in a position where they wouldn't hurt themselves or wouldn't hurt anybody else." Tr. 3-237. Only if it "got to the point . . . where we felt they were a danger to themselves" would the police seek medical attention. *Id.*

Moreover, it was the consistent theme of the police witnesses that respondent was not provided medical care because she appeared to be suffering only from stress related to the arrest and that many arrestees present the same condition. Tr. 3-237-38; 4-318-20. Thus, it is apparent that as a matter of custom and practice, emotional disorders are routinely ignored. A double standard is operative. Physical injuries are treated under the regulation. Tr. 3-337-38; 4-318-20; 2-82. Emotional disorders are not given medical treatment except in extreme (and undefined) circumstances, and the procedures provided by the regulation are not followed for this latter class of cases.

It does not take much imagination to see that this custom can cause extremely serious injury. Rather than allowing trained medical personnel the opportunity to evaluate and treat emotional disorders, the police, pursuant to a well established custom, have carved out a substantial exception to the written regulation. It is inevitable that the practice of denying medical attention in all cases until the person exhibits conduct that is truly dangerous to himself will in some situations cause a denial of necessary medical treatment. This will be true in either of two contexts. First, without any training, the police are likely to make an erroneous evaluation of the medical condition. Symptoms of physical ailments requiring

immediate treatment will be misunderstood as emotional reactions. Second, even if the evaluation that an emotional condition is present is correct, because the police do not seek medical attention for these conditions except in the case where they determine that the individual is clearly dangerous, certain individuals will be denied necessary medical care.

This case proves that point. Respondent could have been suffering from a variety of serious physical and/or emotional disorders, but the police were determined to fit her case into a non-treatment mode. How else can one explain the refusal to seek treatment for an hysterical woman who has fainted on the floor of the police station, who does not have the strength to sit in a chair, and who cannot even reply to a question as to whether she wants medical treatment? And even though her condition turned out to be primarily emotional, the general risk of harm engendered by the custom remains. Further, the custom and practice of not referring such cases unless the person was a danger to herself caused the police not to provide medical care where such care was plainly required. The unrebutted testimony at trial established that the serious emotional injuries were suffered by reason of respondent "being in jail" without medical treatment. Tr. 2-38 (testimony of Dr. Caruso).

Petitioner claims that a custom of denial of medical treatment cannot be established without proof of a course of unconstitutional conduct. But the custom of denying medical care is established by the kind of settled practice proven here regardless of the consequences in individual

cases. A city cannot blithely engage in a course of impermissible conduct awaiting the inevitable the first violation, and claim that it was not engaged in a custom or usage.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the case remanded to the district court for a new trial.

Respectfully submitted

David Rudovsky*
Adam Thurschwell
Kairys & Rudovsky
924 Cherry St. #500
Philadelphia, Pa. 19107
(215) 925-4400

Steven M. Fitten
Emanuella Harris Groves
Dexter W. Clark
22650 Lorrain Road
Fairview Park, Ohio 44126

Counsel for Respondent

*Counsel of Record

REPLY

BRIEF

No. 86-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF CANTON, OHIO,
Petitioner,
v.

GERALDINE HARRIS, WILLIE G. HARRIS,
and BERNADETTE HARRIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF OF PETITIONER

Respondents argue that certiorari should be dismissed as improvidently granted on the ground that the City's brief offers "new" legal arguments in support of its consistently-held position that it cannot properly be held liable under Section 1983 on the facts of this case. Respondents also argue, in the alternative, that this Court should hold that the City of Canton can be held liable under Section 1983 on the ground that the City's "policy" of "inadequate training" did not provide the jailer with the medical training necessary to recognize a poten-

tially serious emotional disturbance. Finally, respondents argue that the facts are sufficient to support a finding that the City is liable under Section 1983 for its "custom" of not providing adequate medical care to emotionally upset arrestees. None of these arguments has merit.

I. THERE IS NO BASIS FOR DISMISSING THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Totally disregarding this Court's repeated observation "that the 'decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition,'" *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 922 (1988), quoting *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985), respondents' initial argument is that the writ should be dismissed as improvidently granted. However, respondents admit that the issue "properly before the Court" is whether, in the circumstances of this case, the City of Canton can be held liable under Section 1983 for the acts of its employees. Resp. Br. 16. That is precisely the issue posed in the Questions Presented in our petition for certiorari. Pet. i.

1. Respondents assert that the City of Canton's brief for the first time raises a new "issue not properly presented" to the courts below: whether a city's "inadequate training" can *ever* constitute a "policy" for purposes of Section 1983 municipal liability. Resp. Br. 8, 19.[1] In the first place, this is a mischaracterization of the City's argument: the City is not arguing that "inadequate training" can *never* constitute a policy. Instead, we argue that such a "policy" cannot form the

[1] "Petitioner urges this Court to fashion a . . . rule, under which a deliberately adopted municipal policy regarding training or supervision can never be the basis of municipal liability . . . ." Resp. Br. 19.

basis of liability unless that policy is itself unconstitutional (Pet. Br. 14-20) or, in the alternative, unless there has been a showing that a city "deliberately" adopted such a policy and that the policy was the "moving force" of the violation. Pet. Br. 20-30.

Second, the ultimate *issue* actually presented in this case—the City's liability under *Monell* for the acts of the police officers in question—has been vigorously litigated since the outset of this case. See, *e.g.*, Brief of Appellant City of Canton, No. 85-3314 (6th Cir. 1985); see also *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). Indeed, it is clear from respondents' own brief that while the City's brief set forth new arguments —whether the city can be liable for a policy that is not itself unconstitutional—it raised no new *issue* that was not fully litigated below. Respondents' suggestion that raising a new *argument* is the equivalent of raising a new *issue* is completely unsupported and blurs the distinction between the issue presented and the arguments in support of petitioner's position on those issues.

2. Respondents assert that the City waited until *after* the petition was granted before raising *any* issue about the underlying validity of the "inadequate training" theory as a basis for municipal liability under Section 1983. But the issue was squarely presented in the petition.[2] In fact, in arguing that the petition should be

[2] The petition for a writ of certiorari stated that:

> [t]he decision of the court of appeals, exposing the City of Canton to substantial liability under Section 1983 for "inadequate training," constitutes a serious misapplication of the principles set forth in this Court's decisions in *Monell* and *Tuttle* for determining what constitutes a custom or policy sufficient to establish municipal liability.

Pet. 8. See Pet. 8-12 (arguing that theory of "inadequate training" was inconsistent with prior decisions of this Court and intent of Congress).

held pending the outcome of *City of Springfield* v. *Kibbe*, 107 S. Ct. 1114 (1987), we stated "[t]he fundamental issue in [*Kibbe*] is identical to the issue presented here, *viz.*, whether the allegedly inadequate training of police officers constitutes a viable theory of municipal liability under 42 U.S.C. § 1983." Pet. 13. Respondents never objected to the issue presented before the Court granted certiorari.[3]

3. The holding of *City of Springfield* v. *Kibbe*, which respondents suggest bears a "striking resemblance" to the instant case, is in fact completely inapposite. In *Kibbe*, the City actually proposed jury instructions setting forth a standard of municipal liability which it subsequently attacked in this Court. Here, not only did the City object to the respondents' proposed jury instructions on municipal liability, but it offered its own proposed jury instruction. The City's proposed instruction,[4] which

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[3] In the courts below, petitioner did not directly challenge the theory of "inadequate training," as a means of establishing municipal liability under Section 1983, because the Sixth Circuit already had ruled to the contrary in prior cases. See Pet. App. 5a. Accordingly, petitioner made several narrower arguments before the court of appeals on that issue. But, according to respondents, in order to "preserve" the argument directly challenging the "inadequate training" theory, petitioner was required to engage in the clearly futile task of requesting a panel of the Sixth Circuit to overrule recent, settled law in that Circuit. Not surprisingly, respondents fail to cite any authority for this rule.

[4] See City of Canton Proposed Jury Instruction IX (reproduced in the parties' Joint Appendix, *Harris* v. *City of Canton*, No. 85-3314 (6th Cir.), at 33):

> In order to prove her claim against the City of Canton, Mrs. Harris must establish by a preponderance of the evidence that the City of Canton has implemented or executed a policy or custom of intentionally depriving prisoners of necessary medical attention. . . . [I]f you find by a preponderance of the evidence that the City of Canton has adopted an official policy or custom that deprives prisoners of their Eighth Amendment Right to be free from cruel and unusual punishment and that this policy or custom was the proximate cause of the harm or injuries to Mrs. Harris, then you are justified in finding that the City of Canton is liable to Mrs. Harris for the alleged harm.

the district court rejected, is entirely consistent with the legal position now being argued by the City in this Court.

II. THE CITY OF CANTON CANNOT BE HELD LIABLE UNDER SECTION 1983 FOR ADOPTING AN ALLEGED 'POLICY' OF PROVIDING OFFICERS WITH INADEQUATE TRAINING

In its opening brief, the City of Canton demonstrated that the theories of municipal liability adopted by the court of appeals failed to state a claim against the City. Respondents' brief does little to defend the theory of liability on which the case was remanded for retrial and ultimately offers no reason why the claim against the City should not be dismissed with prejudice.

A. *The City Cannot Be Held Liable Under Section 1983 Based On A Municipal Policy Unless The Policy Itself Was Unconstitutional*

Based on the language, structure and purpose of Section 1983 (Pet. Br. 14-15), petitioner urged this Court to hold—consistent with every decision of this Court on the issue to date (Pet. Br. 15)—that a "policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here," can *never* meet the policy requirement of *Monell*. Pet. Br. 14-20; *cf. Tuttle*, 471 U.S. at 824, n. 7 (withholding decision on whether Section 1983 municipal liability may be established by constitutional policy).

At the outset, respondents argue that the language of Section 1983, which imposes liability on any person who "causes" a deprivation of rights, precludes this Court from holding that only " 'unconstitutional' city policies can lead to municipal liability." Resp. Br. 21. To the con-

trary, it is fully consistent with the language of the statute to hold that a city "causes" someone to be subjected to a constitutional deprivation only when implementation or execution of an unconstitutional policy leads to injury. See *Tuttle*, 471 U.S. at 828 (Brennan, J., concurring); see also *id.* at 824, n.8 ("[t]he fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the 'moving force' behind a *constitutional* violation") (emphasis in original).

In other words, the appropriate inquiry is whether the injury is caused by the city's unconstitutional act (*i.e.*, its policy) or simply by an employee's unconstitutional act. See Pet. Br. 14-15. In the latter instance, the city should not be held liable—even if the plaintiff can demonstrate some "link" between the employee's act and a constitutional city policy. The reason is obvious: there will always be *some* link between an unconstitutional act and a municipal "policy" decision.[5] See *Tuttle*, 471 U.S. at 823.

Respondents place selective reliance on the legislative history of Section 1983 in an attempt to bolster their argument that municipal liability may be based on a city's "default" in failing properly to implement otherwise constitutional policies. Resp. Br. 23, n.16 (citing Representative Sheldon, Cong. Globe, 42d Cong., 1st Sess 367-68 (1871)). But respondents' reliance on references to "default" in the legislative history blurs the distinction between congressional concern with intentional "defaults" in obligations to equally enforce the law (especially with respect to race)—which would represent an unconstitutional custom or policy—and "defaults" in the

[5] Respondents also argue that a bright-line test for municipal liability should be rejected because it lacks "precedent" and has been "explicitly rejected by the seven Justices of this Court who have discussed the issue . . . ." Resp. Br. 17. Respondents' "head-count" is baseless, given that this Court explicitly "has withheld decision on the issue . . . ." Pet. Br. 14; see *Tuttle*, 471 U.S. at 824, n.7.

sense that the state or city fails to ensure that all laws and policies are implemented without error. As this Court recognized in *Monell*, it is only the "default" of an obligation that is constitutional in nature that gives rise to liability under Section 1983.[6] See *Monell*, 436 U.S. at 692-94. Thus, Representative Sheldon's reference to "the default of the State authorities," when read in context, refers only to that systematic maladministration of the law that occurs when "the State governments criminally refuse or neglect those duties which are imposed upon them." Cong. Globe, 42d Cong., 1st Sess. 368.

Respondents use several hypotheticals to illustrate their argument that "[t]here is no valid or meaningful distinction under § 1983 between an unconstitutional city policy and an otherwise improper city policy . . . ." But these hypotheticals do not support respondents' expansive interpretation of municipal liability under Section 1983. For example, respondents pose a situation in which a city "fail[s] to train its [police] officers that certain uses of deadly force are unconstitutional.

There is nothing in this hypothetical to suggest that petitioner's proposed rule is wrong or unworkable.

[6] Justice Frankfurter, dissenting in part in *Monroe* v. *Pape*, noted that:

> [t]he Forty-second Congress believed that *"denial"* [of equal protection] could be worked by *non-action*, while *"deprivation"* [of due process] required *ill-action;* thus, . . . the scope of federal enforcing power under the Equal Protection Clause reached further . . . than did the equivalent scope of power under the Due Process and Privileges and Immunities Clauses.

365 U.S. 167, 256-57, n.87 (1961) (emphasis added) (citing Cong. Globe, 42d Cong., 1st Sess. 459, 482, 505-06, 514, 607-08, 697, App. 251, 315). Thus, to the extent that Congress was concerned about any "default" on the part of state authorities, it was concerned with the default in equal enforcement of the law that gives rise to a denial of equal protection. The only claim at issue in this case is a single incident of an alleged deprivation of due process.

If, in that hypothetical case, there is *proof of a municipal policy* of promoting—through lack of training or otherwise—the indiscriminate use of deadly force, that policy properly could be found to be unconstitutional (and form the basis of municipal liability). However, if in that hypothetical situation (as in this case), plaintiff presented no evidence with regard to the city's affirmative policy, then there is no proper basis for imposing liability directly against the municipality. Liability should not be based on a jury's determination, in hindsight and without regard to any objective standards, that a city's training was "inadequate" because a constitutional violation may have been committed by a police officer.[7]

If we are correct that the City cannot be held liable unless its policy is itself unconstitutional, then this case is at an end. Neither respondents nor their *amicus* have made any claim that the City had any unconstitutional policy that caused respondents' alleged injuries.

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[7] In a similar vein, respondents offer other hypotheticals in which (1) a city deliberately hires police officers "with a known proclivity for excessive and unprovoked violence" or (2) a city instructs new officers to "do all in their power to capture fleeing felons" and intentionally omits reference to constitutional limits on the use of deadly force. Resp. Br. 22. In those hypothetical cases—which involve a *deliberate municipal choice* to adopt an unconstitutional policy—the municipality might be held liable under the City's proposed standard of liability.

Respondents also are incorrect in suggesting that the City would argue that there is no basis for liability in circumstances in which a city "has no written policy, but trains its officers to enter homes" in violation of the warrant requirement of *Payton* v. *New York*, 445 U.S. 573 (1980). In such a case, not only is the city's policy facially unconstitutional, but the city's conduct (*i.e.*, the training) directly causes the constitutional violation.

B. *The City Cannot Be Held Liable Under Section 1983 Based On A Theory Of Inadequate Training In The Absence Of Proof That The Level Of Training Represented A Deliberate Policy Choice That Was The Moving Force Behind The Constitutional Injury*

Even if this Court were to hold that the City could be liable under Section 1983 for a policy that was not itself unconstitutional, the respondents' proposed standard for municipal liability based on "policy" clearly cannot be sustained.

1. Respondents argue that liability should be imposed when a municipality violates its "duty" to prevent constitutional violations through "reasonable" (*i.e.*, non-negligent) "selection, training, instruction and supervision" of employees. Resp. Br. 22. Respondents also assert that the municipal "standard of care" that controls city liability—*i.e.*, the adequacy of "medical care by jailers"—should be measured, as a matter of constitutional law, against the "universally accepted norms" of training standards developed in various academic and trade journals. Resp. Br. 24-25 (pointing to "[d]iverse authorities" who have promulgated "standards and training curriculum" for police forces); see also *Amicus Curiae* Brief of the American Civil Liberties Union in Support of Respondents, at 11, 17-18 (arguing that rules imposing municipal liability for "inaction" should be adopted because potential liability encourages beneficial expenditures on police training).[8]

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[8] The ACLU assumes that increased municipal liability based on inadequate training is generally positive because it will result in additional spending on training programs, standards and supervision which will protect constitutional rights. See ACLU Br. 14-23. Even accepting that assumption, which may not be correct, it is plain that Section 1983-induced increases in training costs (and damage awards) will, in light of budgetary constraints, result in decreased spending on other necessary municipal social services and programs. Moreover, this Court in declining to hold cities liable on the basis of respondeat superior rejected the argument that the

Petitioner has demonstrated that such a view of municipal liability under Section 1983 is completely unsupported by the language and history of the statute and by the opinions of this Court. Pet. Br. 20-30. At the outset, the rule advocated by respondents requires no showing of any actual municipal "act" for which the city truly is responsible. Instead, the jury is invited to "infer" that the conduct of the police in the single incident in question may be attributed to the "inadequacy" of training and that the City—through its training "policies"—is therefore responsible for the injury in question. See Resp. Br. 22-23. That clearly is an impermissible inference in a Section 1983 action. See *Tuttle*, 471 U.S. at 808 (error to allow jury to "infer" municipal liability based on policy of inadequate training from single excessive use of force); *id.* at 829 (Brennan, J., concurring) ("the plaintiff must predicate his recovery on some particular action taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee").

Despite its rhetoric regarding the "policy of recklessly failing to train or supervise its police officers with respect to . . . necessary medical care [for] persons visibly suffering from emotional disturbances or distress," Resp. Br. 16, the respondents fail to point to a shred of evidence that any such "policy" existed.[9] Respondents simply cannot and do not dispute that the only evidence

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scope of a city's liability under Section 1983 should be expanded to deter unconstitutional conduct. See *Tuttle*, 471 U.S. at 843-44 (Stevens, J., dissenting).

[9] Even under respondents' theory of liability, it must be necessary to identify precisely how the city's training policy was "inadequate." Respondents' reliance in this Court upon various academic writings should not obscure the fact that the record does not contain a shred of evidence that the City's approach to "emotional" injuries—which relied upon the experience and common sense of its police officers—was inadequate. No direct testimony, expert or otherwise, was offered on this issue. Thus, respondents wholly failed to *prove* at trial that the City's approach was inadequate.

of any City policy was the written policy requiring that arrestees be provided with all necessary medical attention.[10]

2. Assuming that it could be inferred that the officer's training was in fact inadequate, respondents' theory of the case nevertheless fails to meet the requirement of intentional or deliberate conduct that is inherent in the "policy" standard of *Monell*. Pet. Br. 25-27. Because liability based upon the "policy" prong of *Monell* may arise from a single act, this Court should affirm its holding that such liability only arises if there is a "deliberate choice" (*Pembaur*, 475 U.S. at 483) made by a municipal policymaker. See *Tuttle*, 471 U.S. 823 ("the word 'policy' generally implies a course of action consciously chosen from among various alternatives"); *Pembaur*, 475 U.S. at 483-84 ("[w]e hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy"); *id.* at 499-500 (Powell, J., dissenting) ("policy" requires governmental approval of rule of general applicability).

Respondents offer several arguments in support of their theory that liability may be based on a showing that the city has been "grossly negligent" in permitting a program of inadequate training to exist. But respondents' argument places a substantial strain on the ordinary meaning of the term "policy." As this Court has noted,

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[10] As in *Praprotnik*, the most that respondents can prove is that City employees erred in the exercise of the discretionary authority delegated to them under the City's clearly permissible policy. See 108 S. Ct. 915, 927 (1988). *Praprotnik* made clear that an exercise of discretionary authority by a city employee does not reflect city policy under Section 1983; instead, a city is liable only for "acts which the municipality has officially sanctioned or ordered." *Id.* at 924 (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986)).

it is "difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless . . . the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. at 823. No policymaker in Canton ever made such a choice.[11]

In support of their reading of the statute, respondents make the counter-intuitive assertion that a city's failure to provide adequate training is "no different than any other consciously chosen practice." Resp. Br. 24. The respondents are simply wrong. Deliberately wrongful conduct reflects a higher—not a lower—degree of culpability than negligent conduct or even "grossly negligent" conduct. Moreover, contrary to respondents' assertion (*id.*), there are no "universally accepted norms" of police training by which to measure a city's "negligence" in deviating from "accepted" training practices; normal police procedure in New York or Los Angeles would be inappropriate, unaffordable or even counterproductive for smaller, less urban communities. Respondents' attempt to federalize police training methods through Section 1983 is wholly unwarranted.

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[11] Respondents argue that the "legislative history of the 1871 Civil Rights Act makes clear that Congress believed that liability should be imposed on a city for gross negligence . . . ." Resp. Br. 27-28. As their sole evidence of this "clear" intent, respondents point to Section 6 of the 1871 Act—which they assert imposes liability on persons who "having the power to prevent" injury to federal rights "shall neglect or refuse to do so." Resp. Br. 28. Respondents' selective quotation of Section 6 fails to acknowledge that the quoted language sets the standard of liability only for persons who "hav[e] knowledge" of but "neglect or refuse" to prevent "the wrongs conspired to be done and mentioned in the *second section of this Act*." Section 6 of the Act, by its terms, has *nothing to do with Section 1* of the Act, which became 42 U.S.C. § 1983. (Section 2 and Section 6 of the 1871 Act, as amended, are codified at 42 U.S.C. §§ 1985 and 1986.)

III. THE CITY OF CANTON CANNOT BE HELD LIABLE UNDER SECTION 1983 FOR ADOPTING AN ALLEGED 'CUSTOM' OF REFUSING TO PROVIDE MEDICAL CARE TO EMOTIONALLY DISTURBED DETAINEES

In its opening brief, the City questioned whether the issue of liability based upon municipal custom properly was preserved by respondents in the district court and on appeal. Pet. Br. 30-31 ("the court of appeals analyzed the case strictly in terms of the 'policy' prong of *Monell*" and "it is not free from doubt whether this issue [of municipal liability based on "custom"] is actually in dispute"). Respondents overlook that question and argue, based upon a reappraisal of the record, that the City should be held liable based upon its "custom" of inadequate training. But respondents' reply to the City's brief (or lack of reply) strongly reinforces our doubt that the "custom" issue is a part of this case.[12] Nevertheless, there is no basis for a retrial on the issue of municipal custom.

1. Respondents agree in principle that a "single incident cannot establish a municipal custom," (Resp. Br. 31) but they seek to avoid the force of that rule by mischaracterizing both the petitioner's argument and the facts of the case. First, respondents warn that the definition of custom "petitioner urges upon this Court" (Resp. Br. 31) should be rejected because under that rule, there can be no liability "until a series of *deprivations* have actually occurred." Resp. Br. 31 (emphasis added). Petitioner makes no such argument. Instead, the City's position is that "a single *incident* is insufficient to establish that the city has deliberately (or even reck-

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[12] As petitioner noted, respondents did not press the "custom" issue in the Sixth Circuit and that court did not hold, or even discuss, whether municipal custom provided an alternative basis of liability. Pet. Br. 30-31. Accordingly, there is no reason for this Court to consider this issue now. *See California* v. *Taylor*, 353 U.S. 553, 556-57, n.2 (1957); *City of Springfield* v. *Kibbe*, 107 S. Ct. 1114 (1987).

lessly) adopted the custom or practice at issue." Pet. Br. 32 (emphasis added). Thus, respondents' argument blurs the distinction between multiple *incidents* of misconduct (which are necessary to reflect a municipal custom) and multiple *deprivations* or *injuries*.

Respondents are wrong in their assertion that, in a case involving a *Tennessee* v. *Garner*-claim that police shot a non-dangerous felon, petitioners would exclude evidence of prior shootings where no one was injured. Resp. Br. 31. To the contrary, such misconduct, if known to municipal policymakers, could clearly serve as a basis for finding a "custom" of violating the constitutional standard in *Tennessee* v. *Garner*, 471 U.S. 1 (1985).

2. On the issue of whether there was sufficient evidence to support submission to the jury of respondents' claim based on custom, respondents state:

> [t]he actual practice of the police and the jailer is not to provide medical care to persons suffering from emotional disturbances or disorders . . . . Emotional disorders are not given medical treatment except in extreme (and undefined) circumstances . . . .

Resp. Br. 36-37. There is no citation to the record to support these allegations of "custom." In fact, the record is devoid of any support for such a finding.

At the outset, it is undisputed that there was *no evidence* whatsoever of prior incidents or prior practices of failing to provide necessary medical care. Moreover, there was no evidence that any official or policymaker in the City of Canton believed that the practice or custom concerning the provision of medical care for detainees was any different than what the City's regulation required.

The *only evidence* relied upon by respondents to support their claim that there was a "custom" of not referring "emotional" injuries for treatment was the testimony of a single patrolman, Officer Norcia. Tr. 3-236-

3-238.[13] In that testimony, Officer Norcia stated that, in dealing with "hysterical" individuals, "we were . . . taught to try to calm them down . . . ." Tr. 3-235. When asked "what [you were] advised or instructed to do" "if you are unable to calm the person down," Officer Norcia stated:

> Well, we'd have to—if it got to the point where they were—where we felt they were a danger to themselves, we would have to seek medical attention for them.

Tr. 3-236. From this single answer, respondents conclude that "it is apparent that as a matter of custom and practice, emotional disorders are routinely ignored." Resp. Br. 37. This conclusion is absurd.

First, there is no such "apparent" conclusion to be drawn from any reasonable interpretation of this testimony. Officer Norcia did not testify that persons who are emotionally upset because of their arrest were "ignored." Instead, Officer Norcia offered the common-sense observation that persons who are emotionally upset because of their detention by police generally do not require hospitalization. Medical care is necessary only in extreme circumstances. Resp. Br. 37. In short, there is *not one word* in the record that supports the assertion that "emotional disorders are routinely ignored."

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[13] The extraordinary weight placed by respondents on this snippet of testimony (in the cross-examination of a non-policymaking official) is illustrated by the fact that those pages of testimony are cited *seven times* by respondent. See Resp. Br. 2, 4, 36, 37.

The only other testimony cited by respondents on the custom issue is that of Police Captain Alan Maxson, another non-policymaking officer. Tr. 4-318-4-319. In response to the question "what things are done" with a "very emotional, hysterical type person," Captain Maxson stated that "they generally cool off on their own" but if the "situation persists, we take them to the hospital." *Id.* No reasonable person could rely upon this statement to find a custom and practice of "routinely ignor[ing]" serious emotional disturbances.

Second, even if Officer Norcia said—as a general rule—that *he personally* would "ignore" crying or other emotional reaction to arrest, that is no evidence of *the City's* custom or practice. Officer Norcia is not a policymaker and no one, including respondents, suggested that there was any basis for Officer Norcia—a patrolman—to testify concerning the City's general customs or practices.

Finally, even if the testimony were sufficient to prove what respondents assert that it proves—that the City did not hospitalize arrestees who were emotionally upset, except in extreme circumstances—such a "custom" would not give rise to Section 1983 liability. Not only is such a custom not unconstitutional, it is an entirely reasonable and prudent response for the City to require the police to exercise their good faith discretion, in light of common sense and experience, in order to determine whether an "emotionally upset" arrestee requires immediate hospitalization.

• • • • •

At bottom, respondents' argument with respect to municipal "custom or practice"—like their argument with respect to municipal "policy"—fails to demonstrate that the City itself was in any way responsible for the alleged deprivation. At best, respondents argue that individual City employees might have erred in their exercise of discretion not to seek medical attention for Mrs. Harris during her 30-40 minutes in police custody. But there is no basis for holding that the City "subjected" respondents "to the deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the order of the court of appeals remanding for a new trial should be vacated and the cause remanded for dismissal of the complaint.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

W. SCOTT GWIN
WILLIAM J. HAMANN
JOHN S. COURY
CANTON LAW DEPARTMENT
City Hall
Canton, Ohio 44702
(216) 489-3251
Counsel for Petitioner

* Counsel of Record

August 11, 1988

AMICUS CURIAE

BRIEF

No. 86-1088

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

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Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. This motion is made necessary by the failure of respondents' counsel to respond to *amici's* requests by mail and telephone for consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case again presents the question under what circumstances a City may be held liable under 42 U.S.C. § 1983 for unconstitutional conduct allegedly attributable to inadequate police training. *See City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987); *City of Oklahoma City v. Tuttle*, 471 U.S. 408 (1985). This issue is of particular interest to *amici* because of the large number of lawsuits brought under § 1983 alleging inadequate training or similar theories as the basis for holding municipalities liable for employee misconduct.

There are strong incentives for plaintiffs to sue municipalities because, unlike individual defendants in § 1983 cases, municipalities enjoy no qualified immunity for actions taken in good faith. *Owen v. City of Independence*, 445 U.S. 622 (1980). Thus, as in this case, a jury may find the municipality liable and the individual defendants not liable for the same conduct. Moreover, municipalities have deeper pockets and are less likely than individual defendants to appeal to the jury's sympathy.[1]

In *Monell v. Department of Social Services*, 436 U.S. 658 (1977), this Court ruled that municipal liability under 42 U.S.C. § 1983 cannot be predicated on the doctrine of respondeat superior, but only on an official policy or custom of the municipality itself. In response to *Monell*, plaintiffs often seek to impose municipal liability by alleging that the misconduct of individual employees results from a municipal policy or custom of inadequate training, supervision, or recruitment. The attraction of such a theory is its universal applicability: with the benefit of 20/20 hindsight, almost any example of employee misconduct can be characterized as preventable by better training or improved supervision.

The result is to compel municipalities to appear and defend numerous lawsuits that involve, at most, misconduct by individual employees. In this area of litigation, *amici* urge the Court to halt the creeping erosion of municipal immunity from respondeat superior liability under § 1983.

Amici submit that the rationale of *Monell* and subsequent decisions requires a holding in this case that a municipal policy or custom can form the basis of liability under § 1983 only if the policy itself violates the Constitution. The Court should clearly reject the notion that a "policy" of inadequate training alone can violate the Due Process Clause.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

May 5, 1988

[1] A recent study, covering Cook County civil cases over the period 1959-1979, indicates that jury awards against government entities are substantially larger than against individual defendants for the same kind of injuries. For moderate injuries, government defendants were assessed 50% more than individual defendants. For very serious injuries, awards against government defendants were 2.5 times as much as for individual defendants. A. Chinn & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 43-44 (Rand Corp. 1985).

QUESTIONS PRESENTED

1. Whether municipal liability under 42 U.S.C. § 1983 can be predicated on a municipal policy or custom that does not violate the Constitution.

2. Whether inadequate training of police officers can give rise to municipal liability under § 1983 as violative of the Due Process Clause.

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

Respondent Geraldine Harris, and her husband and daughter, filed this action under 42 U.S.C. § 1983 against

the City of Canton, the Mayor, the Police Chief, and several individual police officers, seeking damages for injury suffered by Mrs. Harris as a result of her arrest and detention by the police.

Mrs. Harris was lawfully arrested and brought to the police station. Upon her arrival at the station, she was found sitting on the floor of the patrol wagon, and while being booked she slumped to the floor. Regulation 334.7 of the Canton Police Department provides that the jailer "shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail." Pet. App. 5a. The jail supervisor, Captain Maxson, asked Mrs. Harris whether she needed medical attention, but she failed to respond, and, instead asked to see her son, Ronnie. The supervisor concluded that Mrs. Harris was neither ill nor injured, but was experiencing an emotional reaction to her arrest, and did not require medical treatment. She was released on bail less than an hour after her arrest, and taken to a hospital, where she was diagnosed as suffering from gross stress reaction, anxiety, and depression.

The district court granted the motions of the Mayor and Police Chief for a directed verdict The supervisor was not named as a defendant in the lawsuit. J.A. 18-19. The jury found in favor of all the named individual police officers, but awarded Mrs. Harris a verdict of $200,000 against the City on the ground that she was unreasonably denied medical attention while at the jail.

The court of appeals concluded that the district judge had properly instructed the jury that municipal liability could be predicated on the policy, set forth in the regulation, that authorized police station supervisors to decide

whether a prisoner required medical attention, although the City provided no training or guidelines for making that decision. The judgment of the district court was reversed and the case remanded for a new trial because of another portion of the judge's charge that would have permitted the jury to impose liability on the City if "its police department and/or its supervisory personnel . . . in some way participated in the actual misconduct, if any . . . ." Pet. App. 8a. Judge Merritt dissented in part, disagreeing with the majority's conclusion "that a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury on remand." Pet. App. 11a.

SUMMARY OF ARGUMENT

1. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that a municipality is liable under 42 U.S.C. § 1983 for an employee's unconstitutional conduct only if the municipality inflicted the violation through an official policy or custom. The Court should now resolve a question left open in cases since *Monell* by holding that the policy or custom must itself be unconstitutional in order to form the basis of municipal liability. This rule is a logical application of the reasoning by which the Court has rejected respondeat superior liability under § 1983. It is consistent with the Court's frequent observation that § 1983 created no substantive liability apart from the underlying constitutional violations for which it provided a remedy. Liability should not be premised upon a municipal policy unless that policy is unconstitutional and directly authorizes violations committed by municipal employees.

2. The Court has clearly rejected the notion that the Due Process Clause makes negligent conduct unconstitutional. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). The reasoning

of these opinions applies equally to the concept of "gross" negligence.

3. Liability under § 1983 cannot be based upon theories that hold the municipality responsible for violations by employees that are attributed to policies of inadequate training, supervision, or recruitment. Such theories are invalid because they impose vicarious liability upon municipalities that have not themselves violated the Constitution in the policies or customs they have adopted. Such policies, even if grossly negligent, do not violate the Due Process Clause and thus cannot form the basis of § 1983 liability. Any other approach would seriously complicate litigation against municipalities by requiring in each case a potentially wide-ranging inquiry into the reasonableness of administrative practices and policies.

ARGUMENT

I. A MUNICIPALITY IS LIABLE UNDER § 1983 ONLY IF ITS POLICY OR CUSTOM VIOLATES THE CONSTITUTION.

A. A Municipality Can Be Held Liable Under § 1983 Only For Its Own Acts.

Beginning with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which first established that a City is a "person" subject to suit under § 1983, the Court has firmly and repeatedly rejected efforts to impose liability on municipalities based on the doctrine of respondeat superior. These decisions characterize § 1983 as imposing liability on a municipality only for its own violations of the Constitution. In *Monell* itself, the Court, after a thorough review of the background and legislative history of § 1983,[1] concluded (436 U.S. at 694):

[1] The precursor of § 1983 was intended to remedy a specific weakness in the law, that the Fourteenth Amendment conferred certain rights but gave the citizen no remedy to enforce them. *See Monell*, 436 U.S. at 685 n.45, where the Court quoted, among other excerpts from the legislative history, the statement of Senator Thurman, an opponent of the bill, that it "authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action *against the wrong-doer* in the Federal courts . . ." (quoting Cong. Globe, 42d Cong., 1st Sess., App. 216-17 (1871) (emphasis added)).

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Similarly, in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), both the plurality and concurring opinions emphasized that the logic of *Monell* restricted § 1983 liability to the municipality's own violations. 471 U.S. at 818 (plurality opinion); *id.* at 828, 830-31 (Brennan, J., concurring). Both opinions agreed that municipal liability could not be based on a policy inferred from a single incident of police misconduct.

This approach is also consistent with subsequent decisions confirming that § 1983 does not impose respondeat superior liability on municipalities. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988).[2] Both cases focused

[2] In *Pembaur*, the Court stated that, in *Monell*, "we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability" because Congress felt it could impose civil liability on municipalities only for "their *own* illegal acts." 475 U.S. at 479 (emphasis in original). "*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Id.* In *Praprotnik*, the plurality opinion said that *Monell* had "rejected the use of the doctrine of respondeat superior and concluded that municipalities could be held liable only when an injury was inflicted by a government's 'lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" 108 S.Ct. at 923.

on whether a given violation was in fact committed by the municipality as such, or was attributable only to a subordinate officer's personal exercise of discretion; the municipality could not be held to have violated the Constitution unless an act of the municipality, as such, could be identified.[3]

B. A Municipality Can Be Held Liable Under § 1983 Only When An Unconstitutional Policy Causes A Deprivation Of Rights.

The Court has not decided whether a municipality may be held liable for an official policy that is not in itself unconstitutional but may give rise to violations by employees. In *Tuttle*, the plurality opinion suggested that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." 471 U.S. at 823. The concurring opinion criticized as "metaphysical" the distinction between policies that are themselves unconstitutional and those that cause constitutional violations. *Id.* at 833 n.8. *Pembaur* suggested that the limitation was, at the least, that the plaintiff must "establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense." 475 U.S. at 482 n.11 (plurality opinion; emphasis in original).

Finally, in *Praprotnik*, the plurality went even further, holding that "the existence of an unconstitutional municipal policy" was a requisite to a city's liability under § 1983 (108 S.Ct. at 926). The concurring opinion observed that the Court had previously left open "the question whether a city can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations." *Id.* at 936.

Amici would urge the Court to resolve this issue by limiting municipal liability under § 1983 to those deprivations of constitutional rights by employees that are inflicted by an official policy or custom that is itself unconstitutional.[4] This conclusion follows logically from the Court's previous decisions—*Monell*, *Tuttle*, *Pembaur*, *Praprotnik*—which have repeatedly emphasized that under § 1983 a municipality is to be held liable only for its own constitutional violations, and not vicariously for the tortious acts of its subordinate employees. A municipality should not be held to have violated the Constitution unless it has an unconstitutional policy or custom that expressly or impliedly authorizes a deprivation of rights by its employees.[5]

Moreover, to hold otherwise would be to create a separate standard of fault for municipalities under § 1983, apart from that imposed by the Constitution. The Court has often emphasized that § 1983 is purely remedial and provides no basis for the development of a quasi-constitutional tort law. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 146 (1979). As we discuss more fully in Part

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[3] The discussion of "policy" in these cases addressed the question whether the action or decision was properly to be regarded as that of the municipality. For example, the Court in *Pembaur* stated: "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality . . . ." 475 U.S. at 479 (emphasis in original). It was clear in each case that the relevant action or decision, if it *was* that of the municipality, would in itself constitute a violation by the municipality of the Constitution.

[4] A leading authority on § 1983 litigation has recommended this approach. See Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 Iowa L. Rev. 1, 17-33 (1982).

[5] *Monell* and *Pembaur* were examples of express authorization. *Praprotnik* indicated that implied authorization could take the form of acquiescence in "a series of decisions by a subordinate official [that] manifested a 'custom or usage' of which the supervisor must have been aware." 108 S.Ct. at 927.

II below, the § 1983 remedy is not available simply for negligence, but only for conduct that constitutes a violation of the Constitution. As the Court ruled in *Daniels v. Williams*, 474 U.S. 327, 330 (1986):

> [I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. See *e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment).

Therefore, a municipal policy or custom that is alleged to give rise to liability under § 1983 should be judged by the appropriate constitutional standard, and not by standards of fault derived from tort law. Liability cannot be founded merely on the existence of a causal nexus between a municipal policy and a constitutional violation committed by an employee.[6] There must also be proof that the policy itself was unconstitutional, in that the

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[6] The dissenting opinion in *City of Springfield, Mass. v. Kibbe*, 107 S.Ct. 1114, 1120 (1987), emphasized that liability exists only for actual violations by the defendant of the Constitution, and this precludes the use of the concept of causation to expand municipal liability:

> In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to some municipal policy. Finding § 1983's causation requirement satisfied by such a remote connection, however, would eviscerate *Monell's* distinction, based on the language and history of § 1983, between vicarious liability and liability predicated on the municipality's *own* violations.

107 S.Ct. at 1120 (emphasis in original).

municipality deliberately directed or authorized the misconduct.[7]

II. A VIOLATION OF THE DUE PROCESS CLAUSE CANNOT BE ESTABLISHED BY A FINDING OF NEGLIGENCE, EVEN IF CHARACTERIZED AS "GROSS NEGLIGENCE."

The Court has firmly rejected the notion that the Due Process Clause should serve as a vehicle for the imposition of a body of general federal tort law. In *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Court warned against a theory of liability based upon tortious conduct that did not violate a specific constitutional guarantee:

> But such a reading would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from

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[7] The wording "subjects, or causes to be subjected" in § 1983 does not mandate or justify the introduction of the "proximate cause" concept of tort law to create liability for a policy which is not itself unconstitutional but which is alleged to cause constitutional violations by employees. The dictionary assigns two distinct meanings to the verb "cause": first, "to serve as cause or occasion of: bring into existence (careless driving causes accidents) (trying to find what caused the fire) (cause the water to flow into the new channel)"; and, second, "to effect by command, authority, or force (the president caused the ambassador to protest)." Webster's New International Dictionary (3d unabridged ed. 1981). The phrase "causes to be subjected" in § 1983 appears to use the word "cause" as in the second part of the definition. That sense is more consistent with the principle that § 1983 is remedial only, and does not extend liability to persons not directly implicated in constitutional violations.

In light of its context, and the subsequent opinions of this Court referred to above, the statutory language does not support a reading that incorporates the more attenuated notions of causation derived from tort law. Thus, in *Martinez v. California*, 444 U.S. 277, 285 (1980), the Court rejected a theory of § 1983 liability predicated on the "proximate cause" doctrine of state tort law.

> congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source of such law.

As set out below, the Court specifically rejected the proposition that negligence, the mere failure to exercise due care, violates the Due Process Clause. In our view, the same rationale precludes liability based upon a finding of "gross" negligence, even if it can be distinguished meaningfully from simple negligence.

In *Daniels v. Williams*, 474 U.S. 327 (1986), the Court noted that § 1983 had historically been applied to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property" (*id.* at 331) (emphasis in original), reflecting the provision's origins and intent. *Daniels* held that negligence did not rise to the level of a constitutional tort.[8]

In *Davidson v. Cannon*, 474 U.S. 344 (1986), the Court applied the holding of *Daniels* in a context involving allegations of both procedural and substantive due process. A prisoner sued prison officials who had negligently failed to protect him from injury by another inmate, although they had been alerted to the possibility of the attack. The Court held unequivocally (*id.* at 347-48):

> [T]hat lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. . . . Far

[8] In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court characterized the negligent loss of a prisoner's hobby kit by prison employees as a deprivation of property for which procedural due process was required by Fourteenth Amendment. Justice Powell's concurring opinion disagreed: "I would not hold that such a negligent act, causing unintended loss of or injury to property, works a deprivation in the *constitutional* sense." *Id.* at 548 (emphasis in original). *Daniels v. Williams* overruled this portion of *Parratt v. Taylor*.

> from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious . . . . The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.

The Court has not had occasion to determine whether a level of culpability beyond simple negligence, but falling short of intentional wrongdoing, is sufficient to impose liability under the Due Process Clause. This issue was not decided in either *Davidson* or *Daniels* (see 474 U.S. at 334 n.3), although the dissenting Justices in *Davidson* believed that injury caused by official recklessness or deliberate indifference would constitute a deprivation of liberty under the Due Process Clause. See 474 U.S. at 349, 353-55.

It seems doubtful that the somewhat imprecise tort law distinction between simple negligence and "gross" negligence has much relevance under the Due Process Clause. As the Court observed in *Daniels*:

> That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

474 U.S. at 333 (footnote omitted). These observations would appear to apply with equal force to gross negligence as to simple negligence. Even in the field of traditional tort law, the distinction between simple negligence

and gross negligence has proved difficult of application and has been widely criticized.[9]

In any event, it is clear from *Daniels* and *Davidson* that a violation of the Due Process Clause requires an abuse of governmental power, the essence of which is *deliberate* action or, at least, *deliberate* inaction. It may well be that deliberate indifference to a known and immediate risk of serious injury could violate the Constitution under this test, because such conduct might be the equivalent of intentional conduct for purposes of the Due Process Clause. But differentiating between conduct that is negligent and conduct that is grossly negligent under standards of tort law would not appear relevant to the constitutional analysis. Even gross negligence lacks the cognitive element inherent in the concept of municipal "policy."

III. A MUNICIPALITY CANNOT BE HELD LIABLE UNDER § 1983 FOR A POLICY OF INADEQUATE TRAINING, SUPERVISION, OR RECRUITMENT.

As the motion accompanying this brief describes, plaintiffs often seek to hold municipalities liable in § 1983 litigation for "policies" of inadequate training, super-

[9] In the words of one leading text:

> Although the idea of "degrees of negligence" has not been without its advocates, it has been condemned by most writers, and, except in bailment cases, rejected at common law by most courts, as a distinction "vague and impracticable in [its] nature, so unfounded in principle," that it adds only difficulty and confusion to the already nebulous and uncertain standards which must be given to the jury. The prevailing rule in most situations is that there are no "degrees" of care or negligence, as a matter of law; there are only different amounts of care, as a matter of fact. From this perspective, "gross" negligence is merely the same thing as ordinary negligence, "with the addition," as Baron Rolfe once put it, "of a vituperative epithet."

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* 210-11 (5th ed. 1984) (footnotes omitted).

vision, or recruitment procedures, *i.e.*, for failing to take reasonable care to prevent constitutional violations by their employees. The court of appeals held in this case that such liability could be imposed if the policy in question was grossly negligent. A number of other courts have reached a similar conclusion, although the precise formulation varies from circuit to circuit.[10]

It is unclear whether the rationale of these decisions is that a grossly negligent policy is itself unconstitutional, or that such gross negligence suffices to impose vicarious liability under § 1983 even if the policy itself is not unconstitutional. Neither rationale is consistent with the legal principles established by the Court set forth in Parts I and II, *supra*. Even a grossly negligent policy does not incorporate the element of deliberate abuse that characterizes a violation of the Due Process Clause.[11] And gross negligence in the implementation of a policy that is not unconstitutional is simply not sufficient to establish a constitutional violation by the municipality itself.

In fact, the Court has previously rejected attempts to impose this sort of liability. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the Court held that equitable relief was not

[10] *See, e.g., Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986) ("a policy of gross negligence in training or supervision gives rise to § 1983 liability"); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (liability "[i]f a municipality fails to train its police force, or if it does so in a grossly negligent manner so that it inevitably results in police misconduct"); *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (failure to train or supervise law enforcement officers must be so grossly negligent as to constitute "deliberate indifference"). The Sixth Circuit cases are discussed below.

[11] It is, of course, possible that deliberate inaction by a municipality after a widespread pattern of injurious conduct would demonstrate such deliberate indifference as to constitute the equivalent of intent; but no such pattern was demonstrated on the record in this case.

available under § 1983 to require municipal officials to adopt policies that would "reduce the incidence of unconstitutional police misconduct." *Id.* at 378. Although the Court's decision was based in part upon the scope of federal equitable power, it was also based upon a determination that the defendant policymaking officials had played "no affirmative part" in depriving plaintiffs of their constitutional rights. *Id.* at 377.

Then, in *Polk County v. Dodson*, 454 U.S. 312 (1981), the Court rejected claims that a county's official policies regarding public defenders could form the basis of liability under § 1983. The Court found that none of the policies themselves violated the Constitution, citing *Rizzo v. Goode* for the proposition that a "general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983." 454 U.S. at 326.

The erosion of municipal immunity from respondeat superior liability under § 1983 is exemplified by the theory of liability for inadequate training applied by the court of appeals in the present case. That theory had its genesis in *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1983). In *Hays*, the court, relying upon *Rizzo v. Goode*, refused to impose liability on the County for negligent failure to supervise, train, or control. 668 F.2d at 872-74. The court went on to state, however, that, in the absence of a pattern of past misconduct, "a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, or would properly be characterized as substantially certain to result." *Id.* at 874 (citations omitted). *But see id.* at 875 (Merritt, J., dissenting); *id.* at 877 (dissent from denial of rehearing en banc). The Sixth Circuit subsequently characterized *Hays* as holding that:

> [A] municipal custom that authorizes or condones police misconduct can be inferred when the municipality has failed to train or has been grossly negligent in training its police force.

Rymer v. Davis, 754 F. 2d 198, 200-01 (6th Cir. 1985), *vacated and remanded* (in light of *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)), 473 U.S. 901 (1985), *reinstated on remand*, 775 F.2d 756 (1986), *cert. denied*, 107 S.Ct. 1369 (1987).

In the present case, the court of appeals held that the rule of *Hays* and *Rymer* supported the submission of the inadequate training theory to the jury. The court described the basis for the theory as follows (Pet. App. 6a):

> Harris's theory of grossly inadequate training was based on the fact that the police had an established policy of allowing shift commanders unfettered discretion under rule 334.7 to make the decision to refer a prisoner to the hospital based on their personal judgment and perceptions, coupled with the fact that these commanders were given no training or guidelines for making this decision.

In this case, as in many others based upon such theories, the alleged "policy" of the City has a certain air of unreality. The City's police regulation, rather than giving the officer "unfettered discretion," specifies with particularity several circumstances in which he should refer an arrested person for medical treatment. Far from aiming at the deprivation of prisoners' constitutional rights, the regulation is designed for the benefit of the person detained.

There is, however, a more fundamental error than the strained and unrealistic effort of the court to define the municipality's policy. In all of these cases, the court omits an important step in the analysis by assuming that liability can be imposed on a municipality whenever a

court can discern a "policy" that is grossly negligent. As we explained in Part I of this argument, a municipality should not be liable under § 1983 for a policy that is not itself unconstitutional. And, as we explained in Part II, a grossly negligent policy does not violate the Due Process Clause.[12]

In addition to the legal deficiencies in the court's theory of liability, it gives rise to serious practical problems. Litigation concerning municipal policies on training, supervision, or recruitment is likely to extend the scope of a lawsuit well beyond the facts of a particular violation. These issues of institutional competence may be time-consuming to try and difficult to resolve.[13]

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[12] The error in the Sixth Circuit's analysis is not cured by its insistence that the inadequate training must be "causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result." (Pet. App. 5a.) This discussion relates to whether there is a causal link between the City's policy and the ensuing violation, not to whether the policy itself was unconstitutional. As we have shown above (Part I.B.), causation is not sufficient to impose municipal liability under § 1983.

[13] It is not enough to say that only unreasonable or negligent or even grossly negligent policies can form the basis for liability. Such a standard will never permit the municipality to avoid burdensome discovery and rarely prevent the issue from being submitted to a jury. In *Rymer v. Davis*, a case relied upon by the court of appeals in the present case, the court pointedly observed: "The type or amount of training necessary to avoid the inference of a custom that authorizes or condones police misconduct is properly a jury question." 754 F.2d 198, 201 n.1 (6th Cir. 1985). Similarly, courts often refer to the importance of allowing liberal discovery. *See, e.g., Eiland v. Hardesty*, 564 F. Supp. 930, 936 (N.D. Ill. 1982) ("[p]rior to discovery it is unrealistic to expect plaintiff to know much more about the city's policies, and a complaint should be dismissed at the pleading stage only if it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief."); *Escalera v. New York City Housing Auth.*, 425 F.2d 853, 957 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

Resolution of these issues, moreover, would often require the federal court to second-guess many aspects of the municipality's administrative structure and procedures.[14] It could even require the court to substitute its own judgment for a municipality's decisions concerning the allocation of funds among different programs, because a plaintiff could always argue that a policy of inadequate funding in a particular area had caused a constitutional violation.[15]

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[14] In *Rymer v. Davis, supra*, the Sixth Circuit listed no fewer than eight texts as among the resources "available to municipalities to guide them in supervising police officers and in preventing instances of police brutality." 754 F.2d at 201 n.1. As with many cases in this area, the court seemed oblivious to the practical difficulty, especially for small municipalities, of undertaking elaborate training and administrative programs, as well as to the differences among cities that make standardized training impossible. As Judge Merritt pointed out in his partial dissent in this case, the Constitution does not require a court to "erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail."

[15] For example, in *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985), a case of death from a drug overdose in a pretrial detention center, it was held that because testimony had been given that "understaffing was a persistent problem and that complaints had been lodged with [the] supervisors, including [the Director of the City's Bureau of Corrections, who was the relevant policymaker]" (*id.* at 685), the jury had evidence on which to conclude that the City knew that

> the [Center] was inadequately staffed and that it was difficult for the officers to perform their jobs properly. Thus, it was possible for the jury to decide that there was a conscious decision on the part of [the Director] and therefore, the City of Atlanta, not to increase the staff at the Detention Center in the face of complaints of inadequate staffing. The result of this decision was that officers were unable to perform their jobs properly. Furthermore, the jury could have found that [the Director] and the City of Atlanta knew or should have known that the natural consequence of this failure to adequately staff the jail would impair proper medical care and attention necessary to protect the health of pre-trial detainees. *Id.* at 686.

Furthermore, there is no principled basis on which the standard of "adequacy" can be fixed. Precisely what is required by a standard of "adequate" training could in practice become known only after the event, and after a federal court had spoken, and might well vary from court to court and from case to case, because, as previously noted, it would always be arguable that some additional training (or other precaution) would have averted the violation in question.[16] This uncertainty would make rational decisionmaking impossible, and expose municipalities to unlimited potential claims.

Section 1983 raises one of the most important financial issues confronting municipal governments, as this Court has appreciated. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court indicated sensitivity to the importance to municipalities of expanded liability under § 1983, and held that the statute did not permit an award of punitive damages against municipalities. Referring to the application of § 1983 to violations of federal statutory as well as constitutional law, the Court stated:

> Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities.

Id. at 270.

[16] *Compare, e.g., Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983) (policeman hit plaintiff with flashlight during chase; plaintiff relied on police chief's testimony that he knew such use of flashlights was dangerous, and that his own officers sometimes used them in self-defense; plaintiff claimed chief should have prohibited use of flashlights as a weapon, or issued cautionary instructions; jury award of $1,500,000 set aside by j.n.o.v., which was affirmed on appeal); *with Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986) (search warrant issued on basis of uncorroborated informant statement and executed at wrong address; district court dismissed complaint alleging municipality was liable "because of a policy of failing to train the officers in the need to verify informant data before seeking a warrant and in proper methods of executing a warrant"; reversed and remanded to determine if facts alleged a training policy that was grossly negligent).

These comments apply with equal force to an extension of liability, beyond the area of "abuses of governmental authority," to liability for failure to meet undefined, federally imposed standards of "adequacy" in reducing the risk of potential violations by municipal employees.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Sixth Circuit insofar as it held that a jury issue existed and remand for the entry of judgment in favor of the petitioner.

Respectfully submitted,

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the Amici Curiae*

May 5, 1988

AMICUS CURIAE

BRIEF

No. 86-1088

In the
Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF CANTON, OHIO,
PETITIONER,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Amicus Curiae Brief of the American Civil Liberties Union and ACLU of Ohio in Support of Respondents

HOWARD A. FRIEDMAN*
MICHAEL AARON AVERY
Six Beacon Street
Suite 520
Boston, Massachusetts 02108
(617) 367-2626

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties Union
132 W. 43rd Street
New York, New York 10036
(202) 944-9800

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

36 pp

No. 86-1088

IN THE
UNITED STATES SUPREME COURT

October Term, 1987

CITY OF CANTON, OHIO

Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,

Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF OHIO IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. ACLU of Ohio is one of its state affiliates.

The ACLU has long worked to defend basic constitutional rights and, in so doing, has filed numerous briefs with this Court, as counsel for a party or as amicus curiae in many cases requiring construction of 42 U.S.C. §1983, the statute at issue in this case. The ACLU has been particularly concerned about the use of §1983 to remedy unconstitutional police practices.

Because this case raises important issues regarding the standards for imposing municipal liability under §1983 for unconstitutional police conduct, the ACLU

submits this brief as amicus curiae to present its experience and views for the Court's consideration.[1/]

1/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented by respondent.

SUMMARY OF ARGUMENT

Amici join in the argument of respondent that certiorari should be dismissed as improvidently granted.

Amici argue that the term "policy" for purposes of municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978) includes a policy established by the failure of a policymaker to take action when that failure rises to the level of gross negligence. The "bright line" rule, limiting "policy" to a deliberate choice from alternatives, proposed by the petitioner would unduly restrict Monell liability by virtually eliminating claims based on policy. It is certain that a policymaker will rarely deliberately and explicitly choose to adopt an affirmatively unconstitutional policy.

A decade of municipal liability for inadequate training of police officers has resulted in

improved police work and training. Maintaining liability for failure to train police officers is important because it has the effect of deterring constitutional violations.

Finally, the experience of the lower courts indicates that that there is no danger that liability for failure to train will result in respondeat superior liability.

ARGUMENT

I. CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Amici join in the argument of the respondent that certiorari should be dismissed as improvidently granted because the principal issue raised in this appeal was conceded by the City in the lower courts. The important issues raised in this case should be decided by this Court in a case where they have been properly presented and considered below. See City of Springfield v. Kibbe, __U.S.__, 107 S.Ct. 1114 (1987)

II. A MUNICIPALITY MAY BE LIABLE UNDER MONELL FOR ITS FAILURE TO TRAIN POLICE OFFICERS.

Amici join in respondent's argument that a municipality may be liable under Monell v. Department of Social Services, 436 U.S. 658 (1978) when a policy of failing to train police officers causes a constitutional deprivation. We also agree that the appropriate standard of culpability to hold a municipality liable is

one of gross negligence. The purpose of our participation in this case is to present policy issues not discussed by the parties.

A. Municipal Policy May be Set by Inaction

When a policymaker is grossly negligent in failing to establish policies in an area where he or she is responsible for setting policy, a policy has been set by inaction. It follows from previous decisions of this Court that such policy may be set by those officials with final policymaking authority. Pembauer v. City of Cincinnati, __U.S.__ 106 S.Ct. 1292 (1986); City of St. Louis v. Praprotnik, __U.S.__ 108 S.Ct. 915 (1988).

Petitioner contends that municipal "policy" only exists for §1983 purposes when responsible officials make a deliberate choice among competing options and then articulate that choice in an explicit fashion. Petitioner's Brief at 20. As a management model we have no quarrel with this proposition, but it does not reflect the way governments operate in the real

world and should not determine the scope of liability under §1983.

Unfortunately, municipal policy is not always developed in an ideal setting. See D. Yates, The Ungovernable City: The Politics of Urban Problems and Policy Making, (1977). Policymakers may find it expedient to ignore their obligation to establish policy in an area. H. Simon, Administrative Behavior 2nd Ed., 58 (1957) This failure to address issues which a good policymaker would address and to consciously develop policy sets policy; a policy of ignoring serious risks that constitutional violations will result. Whether or not motivated by a conscious desire to avoid accountability such flagrant inattention to government's basic responsibilities should not be rewarded under a remedial statute designed to provide relief for constitutional wrongs.

Nothing in the history or theory of §1983 supports such a result. This is especially true in the area of police practices. Imagine two scenarios in

which an innocent victim is shot by an errant police bullet. In the first scenario the officer is following policy by shooting into a crowd; in the second scenario, the officer has been handed a gun and never trained when deadly force may be used. In both cases, it is eminently reasonable to say that the city is responsible for the resulting death and should be held liable.[1/]

If only those policies which are deliberately adopted from alternatives may subject a municipality to liability, municipalities will rarely be liable for a policy claim under Monell. It is hard to imagine that a policymaker would, after considering various alternatives, deliberately and explicitly adopt an

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1/ The distinction between acts of omission and commission is rarely a useful analytic tool in §1983 cases. See Deshaney v. Winnebago County Dept. of Social Services, No. 87-154, Amicus Curiae Brief of ACLU, et al, at 46-52.

affirmative policy which violates clearly established constitutional law. See Pembauer v. City of Cincinnati, 106 S.Ct. at 1301 (White, J. concurring). If this definition were adopted Monell claims based on policy would apply only in those rare instances when a deliberately adopted policy did not violate constitutional law when adopted but violated later articulated constitutional principles, as in Pembauer.

It would be anomalous for this Court to hold municipalities liable for deliberate acts of policymakers who in good faith felt the policies they established were constitutional, while immunizing from liability policymakers who cavalierly ignored the need for written policy and training in order to comply with the Constitution. The message to policymakers would be simple: ignorance is a defense to municipal liability under §1983.

If petitioner's view were adopted a whole new series of elements would be added to a Monell claim. Plaintiff would be required to introduce

evidence regarding the manner in which a municipal policy was developed. Even a written policy developed in haste without consideration of any alternatives would not subject a city to liability. A trial would focus on the deliberations which took place before a policy was implemented. This is not in step with this Court's decisions. See Owen v. City of Independence, 445 U.S. 622 (1980); Newport v. Fact Concerts, 453 U.S. 247 (1981).

B. The Bright Line Rule Proposed by the Petitioners Would Virtually Eliminate Municipal Liability Based on Policy.

Petitioner proposes that this Court adopt a "bright line" rule limiting policy claims under Monell to officially adopted unconstitutional municipal policies. Petitioner's Brief at 17. What petitioner describes as an effort to clarify §1983 would, in fact, virtually eliminate municipal liability policy claims in police abuse cases brought under §1983.

In police misconduct litigation,

> "policies unconstitutional in themselves" - are understandably rare, or at least rarely surface in litigation in this realm. "Official" statements of law enforcement policy almost inevitably will specifically condemn rather than condone uses of excessive force or other unconstitional conduct by police.

Spell v. McDaniel, 824 F.2d 1380, 1388 (4th Cir. 1987) cert. denied, sub nom. City of Fayetteville v. Spell, __ U.S.__ 108 S.Ct. 752 (1988).

However, the mere existence of an official policy statement which parrots constitutional standards does not prevent a municipality from directly causing constitutional deprivations by its police force. Formal policy must be implemented and police training is essential to implementation. When training is deficient or non-existent a policy statement can easily become a meaningless piece of paper ignored by police officers who are supposed to comply with it. The mere existence of "policy" of this type should not function to

protect a municipality from liability for foreseeable constitutional violations.

A municipality which establishes proper official policies and takes proper steps to implement its policies need not fear imposition of liability under Monell. As recognized by the amicus brief filed by five local government agencies in City of Springfield v. Kibbe, supra "(a)dopting (a) standard of gross negligence amounting to deliberate indifference will preserve important policy concerns." Brief of Amicus Curiae U.S. Conference of Mayors, et al in City of Springfield v. Kibbe, supra at 18. Indeed, imposition of municipal liability for failing to train police officers has resulted in an emphasis on police training throughout the United States which has reduced police misconduct generally as described below.

C. Municipal Liability for Inadequate Training Serves the Purposes Intended by this Court in Monell.

In Owen v. City of Independence, supra, this Court held that a municipality is not entitled to a

qualified immunity defense under §1983, emphasizing the importance of compensatory damages in vindicating constitutional rights. This Court noted that an important purpose of §1983 is "to serve as a deterrent against future constitutional deprivations..." 445 U.S. at 651, and added:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.

Id. at 651-52 (footnote omitted) (emphasis added).

After ten years, litigation under Monell has begun to have the effect sought in Owen of improving police training and procedures, thereby minimizing

constitutional violations.[2/] Before Monell a study of the effect of police misconduct litigation under §1983 concluded that few changes in police practices occurred due to these suits against individual officers. Note, Suing the Police in Federal Court, 88 Yale L.J. 781, 812-814 (1979). A more recent article, by contrast, notes the impact of civil rights litigation on police procedures, supervision and internal review, which it attributes to the imposition of municipal liability. McCoy, Enforcement Workshop: Lawsuits Against Police - What Impact Do they Really Have?, 20 Crim.L. Bulletin 49, 50-51 n.7 (1984).[3/]

2/ As explained in respondent's brief the lower federal courts have all permitted municipal liability for failure to train.

3/ Newspaper articles confirm this phenomenon. See, e.g. Miller "New Questions Arise on Policing Police," N.Y. Times, April 3, 1983 (The Justice Department's Community Relations Service

(Continued On Next Page)

McCoy notes one "obvious result of Section 1983 litigation" is that police departments now act to "carefully maintain a good training program to teach and remind officers of constitutional standards." Id. at 55. Other experts in criminal justice also have observed improved police training due to Monell liability. "People v. Police," 71 A.B.A.J. 36 Feb. 1985. Even police administrators who feel beleaguered by police misconduct litigation concede that §1983 litigation against police agencies has resulted in heightened training and standards. Schnabel, Fighting Back, The Police Chief, Apr. 1988 at 61, 62.

3/ (Continued From Previous Page)
"has recently been inundated with requests for assistance from local governments, seeking municipal liability training and protection. Several police departments have re-examined and altered their firearms policies."); "Police Agencies Seek Ways to Avoid Citizen's Lawsuits." N.Y. Times November 3, 1985; "Report Says Tighter Policies Reduce Killings by the Police." N.Y. Times, October 20, 1985 at A20, col. 1.

An article by the Executive Director of Americans for Effective Law Enforcement, an organization that publishes a manual on police misconduct litigation and provides training to police agencies throughout the country, concludes that police officials agree that increased liability under §1983 has had positive effects including improved pre-employment screening of police officers, better supervision, more attention to discipline and:

> Cities and counties are noting that, under Monell v. Department of Social Services, (1978) a city can be sued in federal court for inadequate training of its officers, and that under Owen v. City of Independence (1980) the defense of good faith is no longer available to the government entity.

Schmidt, Section 1983 and the Changing Face of Police Management, in Police Leadership in America 235 (W. Geller ed. 1985) (hereinafter "Schmidt").

The need to improve training in order to limit municipal liability under §1983 is a constant theme in professional journals read by police policymakers. See

Shofield, Law Enforcement and Government Liability, An Analysis of Recent §1983 Litigation, FBI Law Enforcement Bulletin, Jan., 1981; Scuro, Recent Developments in Government Liability under 42 U.S.C. 1983, Police Chief, Apr., 1982, at 20; Fazo, Use of Deadly Force, Police Chief, Aug., 1985, at 54; Geller, 15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers, Police Chief, Aug., 1985, at 56; Meadows, Perceptions on Police Training, 15 J. Police Sci. & Ad. 1 (1987). Cox, Faughn & Nixon, Police Use of Metal Flashlights, as Weapons: An Analysis of Relevant Problems, 13 J. Police Sci. & Ad. 244 (1985).

Likewise criminal justice agencies now provide training in changing constitutional standards in an effort to prevent constitutional violations. For example, this Court's decision in Tennessee v. Garner, 471 U.S. 1 (1985) required changes in police policies, on the use of deadly force. As a result the United States

Department of Justice, in cooperation with the International Association of Chiefs of Police, developed a national deadly force training project for police agencies. The brochure for this course states: "Garner v. Tennessee has revolutionized Deadly Force Case Law and Liability. This...workshop may save lives and millions in litigation." In short, the potential of municipal liability in the deadly force area for inadequate training and for improper policies has resulted in a prompt and sophisticated response which improves police work and reduces constitutional violations.

The consequences of this adjustment by police departments around the country is both predictable and desirable: there has been a "dramatic decline" in the number of citizens shot by police. Sherman and Cohn, Citizens Killed by Big City Police, 1970-84, 2 Crime Control Reports 2 (October, 1986). One reason for that decline is that the rise of civil litigation has motivated

city governments "to provide state-of-the art standards and practices with respect to deadly force." Id. at 15. The result has been a change in police culture towards professionalism and respect for citizen's constitutional rights.

The professionalization of policing has brought an increased emphasis on training. Police recruit training "has moved from the basement...into its own facilities with its own separate status and identity" during the period from 1952 to 1982. Frost and Seng, The Administration of Police Training: A Thirty Year Perspective 12 J. Police Sci. & Ad. 66 (1984).

Training seminars for police administrators on issues involving use of force and police supervision now take place regularly, sponsored by groups like Americans for Effective Law Enforcement, the International Association of Chiefs of Police, and the Southwestern Law Enforcement Institute. See 37 Crim.Law.Rptr. 2460, 2408, 2356, and 2060 (1985). In

recent years more than 3,000 senior police officials have attended three day programs on police liability and many more have attended shorter programs.[4/] Schmidt, supra, at 229. Twenty years ago police executives had little interest in this subject. Id.

Police departments increasingly employ risk managers and legal advisors "to minimize liability by the improvement of training, the re-examination of department policies, and the reassignment of officers who generate an abnormal number of complaints." Schmidt, supra, at 232. A recent article regarding municipal liability under §1983 concluded:

> over the past decade, Monell has encouraged careful policy review and professionalism within police departments, and the result has been significant deterrence of unconstitutional behavior.

4/ Police training is available from many private agencies as well as free training by state and federal agencies. The argument by amici that small towns cannot undertake elaborate training ignores this. Amicus Brief, International City Management Assn., et al at 17.

McCoy, Civil Rights Suits Not Abusive; Police Have No Cause for Alarm, Legal Times, Oct. 5, 1987 at 14.

Other reports confirm that improved police training reduces complaints about police misbehavior. A recent study by the National Institute of Justice found a 30 percent reduction of civil complaints against police who had formal field training in a survey of almost 300 law enforcement agencies. "Recruit Field Training Said to Reduce Liability Complaints," 10 Crim. Just. Newsletter, at 5 (1987). This suggests that recognizing liability against municipalities for failing to adequately train police officers may in the long run reduce civil rights violations and therefore reduce the volume of litigation in this area.

In sum, the professional commentary on this subject supports the intuitive observation that municipal liability for inadequate police

training is effective in fulfilling §1983's goal of deterring constitutional violations.

D. Municipal Liability for Failure to Train Will Not Result in Respondeat Superior Liability.

Liability for gross negligence in training police officers is direct liability for the failure of policymaking officials to act. A decade of experience has shown that lower courts recognize that municipalities are not vicariously liable under §1983. The lower courts have been, if anything, unduly strict in reviewing these claims.[5/] Thus there is no basis for the claim that liability for failure to train results in "the erosion of municipal immunity from respondeat superior liability." Amicus Brief, International City Management Association, et al at 14.

5/ This Court has recently rejected the notion that §1983 should be narrowly construed to weed out even frivolous claims. See eg Felder v. Casey, No. 87-52C, Slip op. at 16-17 (June 22, 1988).

Amici have reviewed the reported federal decisions during the past three years involving claims of inadequate training under §1983, municipal defendants have prevailed on motions to dismiss or motions for summary judgment in the majority of these cases. See e.g. Thomas v. City of Zion, 665 F.Supp. 642, 648 (N.D.Ill. 1987) (a training program is not inadequate because a police officer did not follow the training one time); Tompkins v. Frost, 655 F.Supp. 468, 470 (E.D.Mich. 1987) (legal training on §1983 is not required); Alberto v. DePinto, 638 F.Supp. 1307 (D.Ct. 1986) (police officers who were trained regarding excessive force not required to have a refresher course); Boren v. City of Colorado Springs, 624 F.Supp. 474 (D.Colo. 1985) (general allegations of failure to train); Bibbo v. Mulhern, 621 F.Supp. 1018 (D.Mass. 1985) (no evidence of inadequate training presented to defeat a summary judgment motion). The contours of municipal liability for a policy of inadequate training

have been established by application of this Court's rulings in the lower courts.

Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985), vacated and remanded, 473 U.S. 901 (1985), reinstated on remand, 775 F.2d 756 (1986), cert. denied, __U.S.__, 107 S.Ct. 1369 (1987) cited by amici in support of the petitioner as an example of improper application of municipal liability is one of the most extreme examples of a policy of inadequate police training and serves as an example of the importance of Monell liability. The City of Shepardsville, Kentucky had no rules or regulations governing its police force, no pre-employment training, and only "on-the-job" training initially. The arresting officer had never been instructed on arrest procedure or treatment of injured persons. The plaintiff was beaten by a city police officer who then rejected the recommendation of an emergency medical technician that plaintiff be taken to

a hospital for medical treatment. Under petitioner's theory a city would not be liable for constitutional violations even under these extreme facts. See also Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985) (failure to provide basic police training as required by state law); Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) (failure to train police in policies regarding use of firearms, high-speed chase, roadblocks and failure to instruct regarding use of force in arrests and inspection of prisoners for injuries as required by state law).

The argument made by the City and amici in their support that the lower courts have found liability based on speculative theories of municipal policy is not supported in the case law. Petitioner's Brief at 13, Amicus Brief at 14.

Cases upholding municipal liability for failure to train police officers have been supported by the evidence. While amici do not necessarily agree with every result reached in the lower courts, certainly the

flood of cases predicted by the petitioner leading to vicarious liability of municipalities has not occurred. Imposing municipal liability for police misconduct only where a previous "custom" of misconduct can be proved would permit foreseeable police misconduct to occur, injuring citizens, before the municipality need take action. It would also remove the incentive to improve police procedures which Monell has provided. Ample resources exist so that with proper training municipalities can prevent constitutional violations before a pattern of abuse occurs. Where a city is grossly negligent in providing such training, with the result that it causes a foreseeable violation of constitutional rights, liability must attach to fulfill the promise of §1983.

CONCLUSION

Should this Court reach the issues raised in petitioner's brief it should hold that a municipal policy of gross negligence in police training is sufficient to

establish municipal liability under Monell. The judgment of the Sixth Circuit should be affirmed and this case should be remanded for a new trial.

RESPECTFULLY SUBMITTED,

Howard A. Friedman*
Michael Aaron Avery
Avery & Friedman
Six Beacon St., Suite 520
Boston, MA 02108
(617) 367-2626

John A. Powell
Steven R. Shapiro
American Civil
Liberties Union
132 W. 43rd Street
New York, NY 10036
(202) 944-9800

*Counsel of Record